Universal legal capacity and adversarial criminal procedure

Challenges in the incorporation of article 12 of the Convention on the Rights of Persons with Disabilities

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Contents

Abstract

The idea of universal legal capacity, arising from article 12 of the Convention on the Rights of Persons with Disabilities, presents a challenge to adversarial systems of criminal procedure which premise procedural fairness on a defendant's mental capacity to actively participate in a trial. Special criminal procedure is used to assess fitness to stand trial and, if a defendant is found unfit, impose dispositions which may involve deprivation of liberty. A universally accessible criminal procedure, designed to eliminate special criminal procedure, could be implemented in adversarial jurisdictions in accordance with three models of change: maintaining adversarial criminal procedure but removing special criminal procedure; shifting from adversarial to inquisitorial criminal procedure; or implementing a "therapeutic" criminal procedure. By using a new institutionalist approach to analyse each of these potential models, I seek to demonstrate the formidable challenge of reforming adversarial criminal procedure in reliance on normative human rights-focused claims alone. Advocates of universal legal capacity seek to overcome deeply entrenched rationalist assumptions about the subject of criminal law: an autonomous individual with the capacity for reason. Adversarial criminal procedure marries normative appeal and functionality in an enduring manner, which the idea of universal legal capacity has not yet successfully challenged. The often-touted "paradigm shift" project underpinning the Convention cannot be meaningfully realised until a coherent alternative to adversarial criminal procedure is articulated.

L'idée de capacité juridique universelle, découlant de l'article 12 de la Convention relative aux droits des personnes handicapées, pose un défi aux systèmes accusatoires de procédure pénale, dont l'équité procédurale repose sur la capacité mentale d'un accusé à

participer activement à un procès. Une procédure pénale spéciale est utilisée pour évaluer l'aptitude à être jugé et, si un accusé est jugé inapte, lui impose des mesures pouvant entraîner une privation de liberté. Une procédure pénale universellement accessible, conçue pour éliminer cette procédure pénale spéciale, pourrait être mise en œuvre dans les juridictions accusatoires selon trois modèles de changement : maintenir la procédure pénale accusatoire mais supprimer la procédure pénale spéciale ; le passage d'une procédure pénale accusatoire à une procédure pénale inquisitoire ; ou la mise en œuvre d'une procédure pénale « thérapeutique ». En utilisant une approche néo-institutionnaliste pour analyser chacun de ces modèles potentiels, je cherche à démontrer le formidable défi que pose la réforme de la procédure pénale contradictoire en s'appuyant uniquement sur les revendications normatives axées sur les droits de la personne. Les partisans de la capacité juridique universelle cherchent à surmonter les hypothèses rationalistes profondément enracinées sur le sujet du droit pénal : un individu autonome doté de la capacité de raison. La procédure pénale accusatoire possède à la fois un attrait normatif et fonctionnel que l'idée de capacité juridique universelle n'a pas encore réussi à remettre en cause. Le projet de « changement de paradigme » souvent vanté qui sous-tend la Convention ne peut être réalisé de manière significative tant qu'une alternative cohérente à la procédure pénale accusatoire n'est pas articulée.

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Introduction

J[1] is a man in his late 30s, detained as a "secure care recipient" in a facility in Auckland, New Zealand. J has been diagnosed with autism spectrum disorder and an intellectual impairment placing his cognitive functioning in the bottom 1% of people his age. His compulsory detention commenced in June 2004 when he was arrested and charged with two minor offences – being unlawfully in a closed yard, and intentional damage. Each charge has a maximum penalty of three months' imprisonment. But J was found "unfit to stand trial" on those two charges in 2005, which opened the door to detention on the basis that he was intellectually disabled and his risk of harming others would continue. J's detention has continued, without interruption, for almost 18 years.

J's alleged offending was minor – he went to a neighbouring property with an axe, which he used to break garage and vehicle windows. But he has been regularly assessed as posing a significant risk of violence. J has violent fantasies of being "James Bond" on "missions", which have at various times involved injuring a student at his high school by cutting the back of her neck, breaking into a school building with the apparent intention of decapitating a teacher, and trying to grab a driver while he was being transported because he wanted to experience being in an accident. J makes drawings depicting severed feet and cut throats. In this context, his 2004 offending was only superficially minor: when apprehended, he said he was "James Bond and licensed to kill".

Had J been fit to stand trial, he would have faced a maximum sentence of three months' imprisonment and, under New Zealand parole laws, be released after six weeks at most.[2]

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[1] *J, compulsory care recipient, by his welfare guardian, T v Attorney-General and others* [2018] NZHC 1209.

[2] Parole Act 2002 (NZ), s 86.

But instead J has been subject to successive "care recipient" orders made by Family Court judges. This is a form of non-criminal disposition under which intellectually disabled people may be detained if they are found unfit to stand trial or not guilty of offending by reason of insanity.[3] The regular renewal of such orders indicates that J continues to be assessed as posing a risk of serious interpersonal violence.

J has challenged his initial "unfit to stand trial" status, the renewals of his "care recipient" orders, and the appropriateness of the legislation setting up these systems, in light of New Zealand's anti-discrimination law.[4] J has claimed that, if the promise of the Convention on the Rights of Persons with Disabilities is to be realised, he must be regarded as having "universal legal capacity" in all facets of life, including criminal procedure, and must not be denied the ability to plead not guilty and stand trial on the basis of his intellectual disability.

J's case is similar to that of Marlon Noble, an Australian man detained after being found unfit to stand trial for various sexual offences. Mr Noble brought a complaint before the Committee on the Rights of Persons with Disabilities. In considering Australia's argument that his treatment was non-discriminatory, the Committee acknowledged that differential treatment remains possible under the Convention. The Committee framed its role as determining whether the differential treatment Mr Noble received was reasonable or discriminatory.[5] The Committee treated Mr Noble as capable of pleading,

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[3] Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (NZ); Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ).

[4] Representing the New Zealand government, I became aware of J's situation when he commenced this legal challenge with his mother's support.

[5] *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012 (Marlon James Noble v Australia)*, by Committee on the Rights of Persons with Disabilities, CRPD/C/16/D/7/2012 (United Nations, 2016) at para 8.3.

understanding the criminal trial, and instructing counsel, if only he had "the support or accommodation he required to exercise his legal capacity".[6] The Committee found Mr Noble's treatment discriminatory, on the basis that Australia did not allow Mr Noble to plead and test the evidence against him, and as a result denied him the equal benefit of the law (in breach of art 5) and prevented him from exercising his legal capacity (in breach of art 12). While differential treatment to account for disability is permissible, the Committee was clear that there is no available justification for denial of a fundamental right guaranteed by the Convention.

As these cases illustrate, the requirement of "fitness to stand trial" common to adversarial systems of criminal procedure is inconsistent with the emergent idea of "universal legal capacity" advanced under the Convention. The purpose of this thesis is therefore to explore how these tensions might be resolved. I do so by addressing the following questions:

1. What is preventing the implementation of universal legal capacity in criminal procedure?
2. Can adversarial criminal procedure be reformed to accommodate universal legal capacity, or does it need to be replaced?

Chapter 1 explores the ideas of "universal legal capacity" and "fitness to stand trial" in greater depth, and explains why doctrinal dispute over the meaning of an ambiguous international legal obligation has reached a dead end. Chapter 2 outlines a theoretical approach to change within adversarial criminal justice systems grounded in new

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[6] *Ibid* at para 8.4.

institutionalism, drawing in particular on discursive institutionalism which seeks to explore how new ideas can contribute to institutional change.

Chapter 3 establishes that advocates of universal legal capacity seek to disaggregate the related concepts of autonomy and rationality, which are deeply entrenched within adversarial criminal procedure as well as substantive criminal law. While disability rights claims have normative appeal, universal legal capacity currently fails to challenge the "cognitive" appeal (or workability) achieved by existing practices.

In light of the need to cultivate such a "cognitive" appeal, chapter 4 examines three possible models of change to adversarial criminal procedure, and notes the barriers to adoption of these models as well as suggesting opportunities for change through a new institutionalist lens.

Chapter 1: Universal legal capacity

State parties to the Convention on the Rights of Persons with Disabilities (**Convention**) have made little progress towards domestic incorporation of the guarantee of "universal legal capacity", drawn from article 12, in the domain of criminal procedure. In this chapter, I endeavour to establish the distance between universal legal capacity (section 1.1) and findings of unfitness to stand trial made in jurisdictions with adversarial criminal procedure (section 1.2). I examine the "dearth of research" on procedural reform in section 1.3, and the impact of aspects of disability politics on calls for such reform (section 1.4). Finally, in section 1.5 I contend that doctrinal disputes as to the scope of art 12 cannot resolve calls for a Convention-based "paradigm shift", and that other theoretical approaches will be needed.

1.1 The emergence of universal legal capacity

The Convention has given rise to a new human rights claim of "universal legal capacity". The crux of this claim is that, regardless of concerns about mental capacity, everyone is equally entitled to be regarded as a legal person with both legal standing (status as a holder of rights and duties) and legal agency (the ability to *exercise* those rights). Universal legal capacity prohibits refusals to extend legal agency to any person on the basis of disability, which calls into question the legitimacy of legal domains as diverse as guardianship law, compulsory mental health treatment, criminal procedure and criminal defences relying on mental state (such as the insanity defence).[7]

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[7] Lucy Series & Anna Nilsson, "Article 12 CRPD: Equal Recognition before the Law" in Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou, eds, *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford: Oxford University Press, 2018) 339 at 340.

This claim is grounded in article 12 of the Convention, which relevantly provides:

> **Article 12 - Equal recognition before the law**
>
> 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Calls for universal legal capacity based on art 12 have emerged through post-adoption interpretation, driven by disability academics, activists, and the views and comments issued by the Committee on the Rights of Persons with Disabilities (**Committee**) established by art 34 of the Convention.[8] Article 12 was intentionally negotiated to be read ambiguously: express endorsement of last-resort limits on legal capacity were sought by states, but rejected by disabled people's organisations during Convention negotiations; to attract broad support, the text could not explicitly embrace universal legal capacity.[9] The leading articulation of the concept of universal legal capacity is the Committee's first General Comment concerning art 12, which it says affirms an equality principle "indispensable for the exercise of other human rights."[10] The key passages of General Comment 1 expounding a universal legal capacity viewpoint are laid out below:

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[8] A notable early example of scholarship describing "universal legal capacity" is Amita Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future" (2006) 34:2 Syracuse J Int'l L & Com 429–462.

[9] Series & Nilsson, *supra* note 7 at 341–8.

[10] *General comment No. 1 (2014) Article 12: Equal recognition before the law*, by Committee on the Rights of Persons with Disabilities, CRPD/C/GC/1 (United Nations, 2014) at para 1.

> *13. Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. … Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.*
>
> *14. … Legal capacity means that all people, including persons with disabilities, have legal standing and legal agency simply by virtue of being human. Therefore, both strands of legal capacity must be recognized for the right to legal capacity to be fulfilled; they cannot be separated. The concept of mental capacity is highly controversial in and of itself. Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.*

Other parts of the Convention provide crucial context for this reading of art 12. The Convention guarantees equality and non-discrimination (art 5), and creates a general duty on States Parties to fully realise all the human rights of disabled people "without discrimination of any kind" on the basis of disability, in part by promoting universal design of all goods, services, equipment and facilities (art 4(1)(f)). Article 9 requires each State Party to take "appropriate measures" to ensure equal access to the physical environment, transportation, information and communications, and other facilities and

services open or provided to the public. As these references demonstrate, the Convention is suffused with the principle of universal design or universal accessibility. General Comment 1 seeks to affirm such universalism in the legal sphere – there is, the Committee says, no justification for restricting access to any legal right or procedure on the basis of disability.

Opposing viewpoints vary according to the particular domain of law, but a common response is that substituted decision-making continues to be permitted by the Convention when it follows a "disability-neutral" functional approach to mental incapacity.[11] This interpretation accords with common understandings among states parties. A typical response to Convention ratification had been to remove disability status-based exclusions from legal capacity (i.e., legal consequences flowing automatically from a finding of mental illness or intellectual disability) from domestic legal regimes, but to retain functional exclusions based on mental incapacity to make the particular decision at issue.[12] A number of state parties also entered interpretive declarations about art 12 when signing or ratifying the Convention, noting their view that limitations on legal capacity were permitted under art 12.[13]

Cognitive disability raises a widely understood challenge to the usual individual autonomy to make consequential reasoned decisions. By "consequential", I mean decisions which have a meaningful impact upon the course of someone's life. By contrast, a person may agonise over what to have for breakfast each day, but their

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[11] Series & Nilsson, *supra* note 7 at 347 and fn 47.

[12] See eg Disability (Convention on the Rights of Persons with Disabilities) Act 2008 (NZ).

[13] Series & Nilsson, *supra* note 7 at 347.

ultimate decision is not likely to impact their life in a meaningful way.[14] "Reasoned" decisions are those which entail more than merely autonomic engagement.[15] Everyone must at some point make consequential reasoned decisions about their personal lives. These decisions could involve reasoning such as the uptake of new information, weighing of alternatives, managing finite fiscal resources, and making trade-offs.

They might also involve weighing beliefs and values, applying instincts and heuristics, and reflecting pressures and obligations arising from relationships. But however much "reason" one might actually apply to any particular decision, the guiding assumption is that a *capacity for reason* is necessary for a consequential decision to take legal effect. The legal consequences of lacking cognitive ability to make such decisions is a universal problem. For example, being unable to make such decisions could create a risk of material deprivation and indignity, or give rise to unconscionable disadvantage in a transaction. Having the competence to make such decisions therefore typically underpins the legal capacity to enter into contracts.[16]

Concerns such as enforceability of agreements and personal vulnerability underpin substituted decision-making systems, whereby a court or an appointed guardian can exercise legal rights on behalf of the disabled person. In the parlance of General

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[14] As Arstein-Kerslake and Flynn note, some disabled people experience denial of legal agency even over the most basic decisions in the private sphere, such as "whom to spend time with and when to eat": Anna Arstein-Kerslake & Eilionóir Flynn, "The right to legal agency: domination, disability and the protections of Article 12 of the Convention on the Rights of Persons with Disabilities" (2017) 13:1 International Journal of Law in Context 22–38 at 24. While recognising that such exercises of legal agency are important to a disabled person's ability to develop, express and sustain their personhood, I take a normative and objective approach to "consequential" decisions in this thesis, focusing on those decisions the legal system is normally concerned with. Such an approach best recognises the necessarily juridical nature of defendants' decisions in criminal procedure.

[15] For example: when someone accidentally touches a hot element, they typically don't deliberate over whether to remove their hand.

[16] See eg Melvin A Eisenberg, *Foundational Principles of Contract Law*, Oxford Commentaries on American Law (Oxford, New York: Oxford University Press, 2018) c 7.

Comment 1, the disabled person retains "legal standing" under such systems (i.e., they have all the entitlements of a legal person), but is temporarily or permanently stripped of "legal agency" to exercise some or all of those rights, due to an assessed mental incapacity to make such decisions. The Committee says these substituted decision-making systems must be replaced with supported decision-making systems.[17] Under supported decision-making, legal agency would no longer be exercised on behalf of a disabled person by reference to their best interests, but rather the state would implement systems which assist a disabled person to give effect to their own decisions based on their will and preferences, however that might be expressed.

1.2 Cognitive disability in adversarial criminal procedure

Disabled people interact with the criminal justice system as complainants, jurors, defendants, and witnesses. As criminal defendants, cognitively disabled people are at risk of different treatment on the basis of mental incapacity, particularly in common law systems where the fairness of a criminal trial is premised on their active participation. Consequential reasoned decisions are at the core of adversarial criminal procedure – whether and how a person pleads; what they instruct their lawyer to do; and whether they give evidence in their defence.

If a court concludes that a defendant lacks the mental capacity to participate in an adversarial trial, it will declare the person "unfit to stand trial".[18] Such findings divert disabled defendants to a parallel criminal procedure, which cannot result in a criminal

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[17] Committee on the Rights of Persons with Disabilities, *supra* note 10 at paras 26–29.

[18] The same terminology is used in both New Zealand and Canada. Other jurisdictions with adversarial criminal procedure may use similar terminology such as "unfitness to plead", such as in Australia: *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, by Bernadette McSherry et al (Melbourne: Melbourne Social Equity Institute, 2017).

conviction but may lead to custodial detention or compulsory treatment in the community by reason of an assessed threat to public safety. I refer to these procedures as "special criminal procedure" throughout this thesis.

By way of representative example, "unfit to stand trial" is defined in New Zealand law as follows:[19]

> *(a) means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; and*
>
> *(b) includes a defendant who, due to mental impairment, is unable—*
>
> > *(i) to plead:*
> >
> > *(ii) to adequately understand the nature or purpose or possible consequences of the proceedings:*
> >
> > *(iii) to communicate adequately with counsel for the purposes of conducting a defence.*

A similar legal position is found throughout the common law world. The common law fitness test has its modern origins in *Pritchard's case*, a mid-19th century English ruling recording a direction to a criminal jury for the purpose of determining Mr Pritchard's fitness to plead.[20] The test has been expanded, notably to include communication with counsel once the right to a full defence through counsel was introduced. It has been

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[19] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ), s 4(1).

[20] *R v Pritchard* (1836) 7 C & P 303; see also *R v John M* [2003] EWCA Crim 3452, at [28]ff.

codified in various jurisdictions including Canada and New Zealand, but remains a part of common law in England and Wales.

In 2003 the England and Wales Court of Appeal in *R v John M* endorsed six areas of inquiry contained in the trial judge's direction to the jury, and held that inability to do any of these six functions meant a defendant was unfit to stand trial:[21]

> *(1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his own defence.*

Common law courts have typically rejected any paternalistic attempt to convert an examination of "fitness" into an assessment of a defendant's best interests; it is enough that a defendant will be minimally capable of participation in the trial. The fair trial guarantees inherent in the normal criminal trial process, including the rules of evidence and prosecutorial burden of proof, make that preferable to an alternative procedure.[22] A failure to choose the best possible defence, or avoid making oneself look foolish, will not amount to unfitness to stand trial.[23] As one appellate court has put it, a person is not unfit to participate in the criminal process "just because the immediate wisdom of their choices is not apparent."[24] This distinction between basic reasoning and communication skills on the one hand, and "best interests" decision-making on the other, has most frequently raised difficulties where a defendant has no cognitive difficulty, but whose

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[21] *R v John M* [2003] EWCA Crim 3452, at [20].

[22] *Unfitness to plead, Volume 1: Report*, by Law Commission, LAW COM No 364 (London: HM Stationary Office, 2016) at para 2.2.

[23] *R v Robertson* [1967] 1 WLR 1767 (EWCA).

[24] *Solicitor-General v Dougherty* [2012] NZCA 405; [2012] 3 NZLR 586, at [52].

decisions are substantially driven by a delusional belief.[25] In *John M* the England and Wales Court of Appeal upheld the trial judge's directions to the jury which explained that it is "not necessary" that instructions to lawyers or evidence given should be "plausible or believable or reliable" as many defendants choose to give unreliable or implausible evidence; rather the defendant should be able to understand questions from his lawyer or the prosecution counsel (if he testifies), and to consider them and to intelligibly convey his answers.[26] In Canada this idea has been similarly expressed as a need for the "limited cognitive capacity" required for trial participation.[27]

Accommodating disability within adversarial criminal procedure

There is, then, an already-widespread reluctance amongst common law courts to invoke the unfitness test and resulting special criminal procedure. In light of this libertarian orientation towards criminal defendant decision-making which sees all but the most cognitively impaired defendants stand trial in the same system, common law courts have long pursued accommodation of cognitive disability within the trial process. Diversion into special criminal procedure is a last-resort measure, typically reserved for situations when accommodations cannot be made within the adversarial trial. To illustrate this, I refer to the three degrees of cognitive disability proposed by Martha Nussbaum, which correspond with different degrees of response required to modify cognitively heavy functions of citizenship such as voting and jury service.[28]

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[25] David Collins, "The Dilemma Caused by Delusional Defendants" (2015) 46:3 VUWLR 811.

[26] *R v John M* [2003] EWCA Crim 3452, at [21]-[24].

[27] *R v Whittle* [1994] 2 SCR 914.

[28] Martha Nussbaum, "The Capabilities of People with Cognitive Disabilities" in Eva Feder Kittay & Licia Carlson, eds, *Cognitive Disability and Its Challenge to Moral Philosophy* (Chichester, West Sussex ; Malden, MA: Wiley-Blackwell, 2010).

Case A is "cognitively and physically capable…but because of stigma and majority social arrangements, really enabling the person to [participate]…will require special efforts and expense." Nussbaum says addressing Case A's needs is "extremely easy": it simply requires spending money to facilitate full inclusion. Case B, according to Nussbaum, cannot exercise such functions independently – perhaps because of a difficulty in understanding or communication without significant assistance – but can, with support, form views and communicate them to a trusted guardian, who can act as an intermediary when exercising those functions. Case B is also relatively easy to address, according to Nussbaum, and is really a difference of "degree, not kind" from Case A.

Within adversarial criminal procedure, Cases A and B can normally be addressed with accommodation and adaptation. This can mean shortening the court day, allowing for more breaks, implementing alternative ways of taking evidence, permitting more regular discussions between a defendant and their lawyer, and allowing a defendant to sit with and seek assistance from a trusted family member or interpreter. Court familiarisation visits for disabled defendants, and foregoing court regalia such as gowns and wigs, are among other adaptations designed to make participation in the criminal process more accessible.[29] Such approaches reflect the duty arising from art 12(3) of the Convention to take appropriate measures to support provide support in the exercise of legal capacity.

Nussbaum's Case C involves a disability "so profound that he or she is unable to perform the function in question, even to the extent of forming a view and communicating that view to a guardian." Case C is similar to the "unfitness" test set out

[29] Law Commission, *supra* note 22 at para 2.10.

above: such cognitive deficits are thought of as too severe to be accommodated within adversarial criminal procedure.

The choice between integration into mainstream institutions or separation into segregated ones raises a well-known dilemma of difference: the risk of reinforcing societal stigma and the negative impacts of a disabling society, either by ignoring difference or by focusing on it.[30] Participation in the mainstream adversarial criminal process, even with adaptations, is beyond the capabilities of a small number of defendants, such as Nussbaum's Case C. Because adversarial procedure hinges on a defendant's active participation as a decision-maker, defendants like Case C would be disadvantaged compared to other defendants and be at risk of an unfair trial and wrongful exposure to criminal sanctions. This would be an invidious consequence of ignoring difference.

A separate process – special criminal procedure – accounts for this difference by protecting against the risk of procedural unfairness for people with cognitive disabilities. But separate procedures tend to reinforce stigma, and expose defendants to the risk of detention based not on what is required by way of criminal punishment, but rather what is necessary to protect people from their predicted future offending. Open-ended detention for future risk is often the corollary to a special procedure which does not seek to prove culpability for prior offending. As J's case demonstrates, detention focused on future risks rather than past culpability can lack proportionality to the offending behaviour and result in a far greater period of detention than could have been imposed if the defendant had been able to plead guilty to the criminal offence. Inability to

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[30] Martha Minow, "Learning to Live with the Dilemma of Difference: Bilingual and Special Education" (1985) 48:2 Law and Contemporary Problems 157.

accommodate Case C within adversarial criminal procedure leads to a special criminal procedure which reinforces the stigma of Case C's impairment.

1.3 Literature on incorporating universal legal capacity into the criminal justice system

Lucy Series captures much of the early debate as to the extent to which art 12 challenges existing conceptions of mental capacity in the law, and sets out the competing views as to the permissibility of substituted decision-making under the Convention.[31] This has been the central debate arising under art 12, with its focus not on criminal law but rather on day-to-day decision-making in relation to medical and welfare decisions. Series concludes that the Convention "poses a radical challenge to entrenched ways of thinking about legal capacity" grounded in "values of equality, autonomy, independence, inclusion and participation."[32] This approach has encountered "palpable resistance" from government organisations and medical professionals.[33]

The more sparse (but equally contentious) nature of the debate around the impact of art 12 on criminal procedure is captured by Gooding and O'Mahony, who conclude:[34]

> *Perhaps the most striking observation … is the dearth of research on the implications of the CRPD on unfitness to stand trial laws. The few commentaries that do exist reveal interpretations that differ considerably. Some*

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[31] Lucy Series, "Comparing Old and New Paradigms of Legal Capacity" (2014) 2014:1 Elder LJ 62–70.

[32] *Ibid* at 70.

[33] Lucy Series, Anna Arstein-Kerslake & Elizabeth Kamundia, "Legal capacity: A global analysis of reform trends" in Blanck Peter & Eilionóir Flynn, eds, *Routledge Handbook of Disability Law and Human Rights* (London: Routledge, 2016) 137 at 145–151.

[34] Piers Gooding & Charles O'Mahony, "Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia" (2016) 44 International Journal of Law, Crime and Justice 122–145.

> *call for a strengthening of procedural safeguards in the application of unfitness to stand trial laws using mental capacity assessments so that the number of people captured under this provision could be expanded, while others call for an end to deprivations of liberty following unfitness to stand trial determinations and an abandonment of assessments of mental capacity altogether.*

This extract highlights two features of the debate as to the impact of art 12 on criminal procedure: *neglect* of the criminal procedural domain, and *division* as to the requirements of Convention compliance.

As well as the focus on non-criminal decision-making noted above, the "dearth of research" identified by Gooding and O'Mahony can be partly explained by the tendency amongst those advocating for broader acceptance of the Convention to consider the substantive and procedural aspects of criminal law together. While Convention advocates see eliminating special criminal procedure as important, this claim is rarely addressed in isolation. Instead the focus falls on the substantive impact of such procedures, such as detention or compulsory treatment imposed through criminal justice systems.

This concern with substantive criminal law and dispositions arises from art 14(1)(b), which provides that "the existence of a disability shall in no case justify a deprivation of liberty." The Committee says art 14 absolutely prohibits detention on the basis of disability, and permits no exceptions.[35] No distinction is made between detention on the basis of risk of further offending following a special verdict of not guilty by reason of

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[35] *Guidelines on the right to liberty and security of persons with disabilities*, by Committee on the Rights of Persons with Disabilities, A/72/55 (United Nations, 2015) at para 6.

insanity, and detention following an "unfit to stand trial" finding.[36] The Committee tends to restrict observations on art 12 compliance to systems providing for substituted decision-making, but has occasionally regarded findings of unfitness to plead as breaching art 13,[37] which guarantees access to justice on an equal basis.[38] Commentary touching on special criminal procedure is therefore often situated within a collective discussion of mental health doctrine in criminal law, and arts 12, 13 and 14 of the Convention.[39]

Arstein-Kerslake et al conclude that all declarations of unfitness to stand trial are best seen as inconsistent with art 12, despite their intention as a protection from an oppressive criminal procedure which a defendant cannot understand.[40] Although they propose no schematic for a CRPD-compliant criminal procedure, they note the contrasting inquisitorial model of criminal procedure and suggest that more research is needed as to how common and civil law systems can inform each other in the incorporation of

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[36] *Ibid* at paras 13–16; Tina Minkowitz, "Rethinking criminal responsibility from a critical disability perspective: The abolition of insanity/incapacity acquittals and unfitness to plead, and beyond" (2014) 23:3 Griffith Law Review 434–466 at 441 and fn 27. Recent concluding observations continue this practice; see eg *Concluding observations on the initial report of India*, by Committee on the Rights of Persons with Disabilities, CRPD/C/IND/CO/1 (United Nations, 2019) at paras 30–31; *Concluding observations on the initial report of Luxembourg*, by Committee on the Rights of Persons with Disabilities, CRPD/C/LUX/CO/1 (United Nations, 2017) at paras 28–29; *Concluding observations on the initial report of Canada*, by Committee on the Rights of Persons with Disabilities, CRPD/C/CAN/CO/1 (United Nations, 2017) at paras 31–32; *Concluding observations on the initial report of the Plurinational State of Bolivia*, by Committee on the Rights of Persons with Disabilities, CRPD/C/BOL/CO/1 (United Nations, 2016) at paras 35–36; Series & Nilsson, *supra* note 7 at 361.

[37] See eg *Concluding observations on the second and third reports of Australia*, by Committee on the Rights of Persons with Disabilities, CRPD/C/AUS/CO/2-3 (United Nations, 2019) at paras 25–26.

[38] Article 13 is closely related to the art 12 guarantee, being originally conceived of as a component of art 12: Eilionóir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (London: Routledge, 2016) at 37.

[39] See eg Gooding & O'Mahony, *supra* note 34; Anna Arstein-Kerslake et al, "Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities" (2017) 17:3 Human Rights Law Review 399–419; Michael L Perlin, "God Said to Abraham/Kill Me a Son: Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence" (2017) 54:2 Am Crim L Rev 477–520.

[40] Arstein-Kerslake et al, *supra* note 39.

universal legal capacity.[41] I draw on this insight to inform the procedural models I evaluate in chapter 4 below.

Tina Minkowitz, a leading voice of the psychiatric "survivor" movement, supports the Committee's comments on the scope of art 12.[42] Minkowitz goes some way towards addressing the challenge of a Convention-compliant criminal justice system lacking special criminal procedure or the insanity defence. She contrasts the evaluative, hierarchical decision-making required by the concept of "mental capacity", against a decision-making process that would be value-neutral, affording equal respect to all subjectivities.[43] She also argues for a "mainstreaming" of all convicted offenders in prisons in reliance on art 14, contrary to the long-standing norm of removing mentally ill prisoners to hospitals reflected in the United Nations Standard Minimum Rules for the Treatment of Prisoners.[44]

Like Minkowitz, Amita Dhanda says recognising universal capacity rather than engaging in "unfitness" or "insanity" procedures will require prosecutors to prove offences and criminal intention on the same basis as all other defendants, and allow disabled people to take advantage of the same general defences.[45]

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[41] *Ibid* at 417.

[42] Minkowitz, *supra* note 36.

[43] A more in-depth discussion of the challenges of disability neutrality in criminal law is provided by Jill Peay, "Mental incapacity and criminal liability: Redrawing the fault lines?" (2015) 40 International Journal of Law and Psychiatry 25–35; and Meron Wondemaghen, "Testing Equality: Insanity, Treatment Refusal and the CRPD" (2017) 25:2 Psychiatr Psychol Law 174–185.

[44] Minkowitz, *supra* note 36 at 452–3.

[45] Amita Dhanda, "Universal Legal Capacity as a Universal Human Right" in Michael Dudley, Derrick Silove & Fran Gale, eds, *Mental Health and Human Rights* (Oxford: Oxford University Press, 2012) 177.

Michael Perlin, on the other hand, asserts that both fitness tests and the insanity defence are consistent with the Convention.[46] He describes the Committee's views to the contrary as "wrongheaded" and "destructive". Perlin suggests that other counterbalancing rights, both in the Convention and general guarantees such as the right to a fair trial, would be undermined were the Committee's approach to be adopted.[47]

1.4 Impact of disability theory and politics

The claim of universal legal capacity involves significant departure from established ways of treating cognitive impairments within legal systems. Understanding this claim requires a brief diversion into disability theory and politics, and how this has informed the development of the Convention. Doing so will help to illuminate two issues of consequence throughout this thesis. The first is the "strong constructivist" nature of universal legal capacity arguments which (wrongly) doubts the very existence of cognitive impairment. The second is the problem of equivalence resulting from the collapse of tangentially related issues under the universal legal capacity banner, in service of a political strategy of "strategic unity".

Models of disability and the Convention

Disability has been conceptually "modelled" in different ways since its recognition. A plethora of models with various emphases can be drawn on, but the major conceptual shift over the 20th century was the emergence of a "social model" of disability to replace a "medical" approach. The initially dominant medical or biological model focused on

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[46] Perlin, *supra* note 39.

[47] See to a similar effect Mervyn Colin Freeman et al, "Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities" (2015) 2:9 The Lancet Psychiatry 844–850.

the personalised "tragedy" of bodily or neurological impairment. This has been challenged by a "social" model, which denied that impairment necessarily gives rise to "disability" but rather highlighted the disabling impact of environmental factors on people with impairments.[48]

The social model is a political device focused on the "collective experience of disablement",[49] designed to shift attention towards "the problems caused by disabling environments, barriers and cultures."[50] While "cultures" (and not only physical environments and formal structures) are a theoretical focus of the social model, the model has been critiqued by scholars of "critical disability studies" for not *necessarily* contesting the "cultural category" of disability – the "underlying attitudes, values and subconscious prejudices and fears that are the basis of a persistent, albeit often unspoken, intolerance."[51] While the social model can be conceived of as extending to embrace the critical disability studies stance, some critical scholars prefer to distinguish their approach for these reasons.[52]

A more fruitful division might be found between degrees of constructivism. When the social model acknowledges the reality of individual impairment and emphasises interaction between impairment and environment in the production of disability, it can be regarded as a form of "weak" constructivism. The postmodern cultural critique tends

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[48] Colin Barnes, "Understanding the social model of disability: Past, present and future" in Nick Watson & Simo Vehmas, eds, *Routledge Handbook of Disability Studies*, 2d ed (London: Routledge, 2019) 14.

[49] Michael Oliver, *Understanding Disability: From Theory to Practice* (Hampshire: Palgrave Macmillan, 2009) at 48.

[50] Barnes, *supra* note 48 at 20.

[51] Margrit Shildrick, "Critical disability studies: Rethinking the conventions for the age of postmodernity" in Nick Watson & Simo Vehmas, eds, *Routledge Handbook of Disability Studies*, 2d ed (London: Routledge, 2019) 32 at 37.

[52] Helen Meekosha & Russell Shuttleworth, "What's So 'Critical' about Critical Disability Studies?" in Lennard J Davis, ed, *The Disability Studies Reader*, 5th ed (New York: Routledge, 2016) 171.

towards a more value-free assessment of underlying impairments as merely different subjectivities which have acquired cultural meaning, and thus can be considered a form of "strong" constructivism. Critique of the constructivist tendencies of the social model has itself been doubted,[53] but such claims are perhaps easier to sustain in relation to critical scholarship.[54]

The Convention is strongly informed by the social model, but is also claimed to improve upon[55] it by encompassing a new "human rights-based model" of disability.[56] However, as Lawson and Beckett explain, while the social model is a "descriptive and heuristic model of disability" flexible enough to be deployed in various contexts to identify disabling structures and inform reform efforts, the human rights approach does not really model how disability works. Rather it is a "prescriptive model of disability policy" in that, unlike the social model, it answers the question "what should we do" in relation to disabled people. This implies different "claims to belonging" under each model: the human rights approach is "focused primarily on belonging to the human race" whereas the social model constructs a "political category of disabled people."[57]

Perhaps because universal legal capacity contests a deeply culturally entrenched link between rationality and legal capacity, arguments deployed in support quickly display a strong constructivist streak which seems to contest the existence of people like

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[53] As explored by Jonas-Sébastien Beaudry, "Beyond (Models of) Disability?" (2016) 41:2 JMPHIL 210–228.

[54] *An Introduction to Critical Realism as a Meta-Theoretical Research Perspective*, by John Owens, kclpure.kcl.ac.uk, Centre for Public Policy Research Working Paper Series No. 1 (London: Centre for Public Policy Research, King's College London, 2011) at 9.

[55] Theresia Degener, "A human rights model of disability" (2014) Routledge Handbook of Disability Law and Human Rights.

[56] Committee on the Rights of Persons with Disabilities, *supra* note 10 at para 3.

[57] Anna Lawson & Angharad E Beckett, "The social and human rights models of disability: towards a complementarity thesis" (2021) 25:2 The International Journal of Human Rights 348–379.

Nussbaum's Case C. For example, General Comment 1 suggests that mental incapacity is merely something a person is "considered to have", and characterises practices of cognitive assessment as "presum[ing] to be able to accurately assess the inner-workings of the human mind". In a similar vein Anna Arstein-Kerslake, describing what she terms the "illusion of cognition",[58] doubts the legitimacy of any attempt to question cognitive ability, saying that legal or philosophical personhood should not depend on a measurement of something we do not know and may not ever know: "the complexities of the human mind – or the source of reason or rationality."[59] She says the functional approach wrongly "assumes there is an accurate way to test for mental capacity and measure an individual's cognitive skills".[60]

These arguments depend on identifying imperfection in scientific models to doubt the existence of the phenomenon they describe. But it is not necessary to understand every aspect of a phenomenon to acknowledge that it is real and measurable. There is broad scientific acceptance of the ability to measure intelligence and cognition, and that assessed cognitive impairments correlate with findings of unfitness to stand trial.[61] The fact that the empirical methods adopted by psychiatry and psychology do not perfectly represent the mechanism or experience of cognition or mental distress does not invalidate the fact that such mental impairments or distressing mental states actually

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[58] Anna Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities: Realizing the Right to Equal Recognition Before the Law* (Cambridge: Cambridge University Press, 2017) at 88.

[59] *Ibid* at 42.

[60] *Ibid* at 88. Arstein-Kerslake misreads a paper about the measurement of human intelligence to support her point, when that paper does not make any suggestion that intelligence cannot be measured: Adam Hampshire et al, "Fractionating Human Intelligence" (2012) 76:6 Neuron 1225–1237.

[61] Amanda Jane White, Susanne Meares & Jennifer Batchelor, "The role of cognition in fitness to stand trial: a systematic review" (2014) 25:1 The Journal of Forensic Psychiatry & Psychology 77–99.

occur.[62] Further, the use of evidence to approximate mental states and establish legal consequences is commonplace in criminal and regulatory law, sometimes with very severe impacts such as life imprisonment. If direct access to thoughts were possible, much time and effort spent obliquely proving intention or knowledge in criminal proceedings could be avoided. This thesis proceeds on the basis that people such as Case C do exist, and that, because they may lack the capacity for consequential reasoned decisions in relation to the adversarial criminal trial process, they pose a challenge to the future of that process in a universally accessible, Convention-compliant legal system.

Strategic unity

Reliance on strong constructivist arguments is in any case highly selective: the flexible obligation of accommodation and support in art 12(3) means that, except when trying to sustain a philosophical justification for universal legal capacity, Convention advocates generally acknowledge that different people have varying degrees of cognition. After extensive consultation with disability academics in the course of its unfitness project, the England and Wales Law Commission suggests that people privately accept the reality of severe cognitive impairment in criminal procedure:[63]

> *…no disability rights academic particularly welcomed the suggestion that there may be a small group of defendants in criminal cases who will be unable, no matter the assistance provided, to participate effectively in trial. However, all acknowledged that this is liable to occur and that public protection concerns would require ongoing criminal proceedings in some form in some cases.*

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[62] David Pilgrim, "The Failure of Diagnostic Psychiatry and some prospects of Scientific Progress Offered by Critical Realism" (2013) 12:3 Journal of Critical Realism 336–358.

[63] Law Commission, *supra* note 22 at para 3.171.

Such private acknowledgement of difficulties, while maintaining a unified public front, is a well-documented feature of disability politics. The Convention was negotiated in an environment of "strategic unity"[64] whereby a single representative of disabled people, the International Disability Caucus, adopted consensus positions from the diverse range of disabled people and organisations involved.[65] Such unity has been adopted at other levels of disability politics as well.[66] "Disability" is a broad church – an intellectually disabled and autistic man with violent tendencies, like J, has little in common with (say) a woman who uses a wheelchair – but a disability politics seeking broad-based human rights-based public policy grounded in the social model claims to cover both of their interests. This does not necessarily mean that they have "something fundamentally in common", but rather that members of disability movements "can collectively perform a set of characteristics in order to further the goals of a social movement".[67]

Strategic unity is acknowledged as a powerful tool for social progress which has radically improved the conditions of disabled people's lives, but it acts as a double-edged sword which can serve to muffle dissenting views and obscure complexity behind simplistic normative claims. For example, art 14 is often claimed to prohibit any detention on the basis of disability, including all forms of civil detention following criminal proceedings, but also compulsory mental health treatment. This runs into the little-acknowledged difficulty that most people with acute mental health difficulties view compulsory

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[64] Series & Nilsson, *supra* note 7 at 341.

[65] Maria V Reina, "How the International Disability Caucus worked during negotiations for a UN Human Rights Convention on Disability", (6 February 2008), online: *Global Action on Aging* <http://globalag.igc.org/agingwatch/events/CSD/2008/maria.htm>.

[66] Christine Kelly, "Wrestling with Group Identity: Disability Activism and Direct Funding" (2010) 30:3/4 Disability Studies Quarterly, online: <https://dsq-sds.org/article/view/1279>.

[67] Kelly uses the term "strategic essentialism": *Ibid*; Shildrick describes "strategic necessity": Shildrick, *supra* note 51 at 35.

interventions such as hospitalisation positively. In one representative study of people who had either a "positive", "ambivalent" or "negative" experience of compulsory hospitalisation, 75% agreed that some form of coercive intervention – that is, overriding their will and preferences as expressed at the time of their admission – was appropriate.[68] I later suggest that strategic unity has proven something of a barrier to articulation of a cognitively appealing formulation of universal legal capacity in practice.

1.5 The limits of doctrinal reasoning

Criminal justice systems are complex institutions. Criminal courts are typically established by legislation defining their jurisdiction and place within a judicial hierarchy, in order to apply a substantive criminal law in accordance with a procedural code. The combination of establishing legislation, substantive criminal law and procedural code is normally sufficient to define the actors in each system (judges, prosecutors, lawyers, defendants, witnesses etc.), constrain their behaviour, and indicate the range of possible outcomes. Elements of a criminal justice system antecedent to hearings before criminal courts (i.e., investigative powers, charging decisions) also need to be defined in a way which complements criminal procedure.

Special criminal procedure is thus typically codified in adversarial systems. The "dualist" orientation towards the domestic incorporation of international treaties, which remains predominant in most states with an adversarial criminal procedure rooted in English law,[69] means there is no prospect of criminal procedural codes being abandoned on the

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[68] Christina Katsakou et al, "Psychiatric patients' views on why their involuntary hospitalisation was right or wrong: a qualitative study" (2012) 47:7 Soc Psychiatry Psychiatr Epidemiol 1169–1179. Other studies of psychiatric service-users to a similar effect are summarised in Freeman et al, "Reversing hard won victories in the name of human rights", *supra* note 47 at 848.

[69] Anthony Aust, *Handbook of International Law* (Cambridge, UK: Cambridge University Press, 2005) at 83.

basis that the Convention's universal legal capacity requirements are now supreme law. Efforts to advance definitive doctrinal interpretations of art 12 which favour universal legal capacity – the suggestion, for example, that requiring universal legal capacity is the only defensible interpretation of art 12 available when the Vienna Convention on the Law of Treaties is applied[70] – cannot overcome codified criminal procedures requiring diversion from mainstream trial procedure.

Neither can suggesting universal legal capacity is a mistaken interpretation draw a neat end to the debate. Doctrinal dispute as to the reach of art 12 does not engage with the goals underlying the Committee's approach. The Convention implicitly articulates general principles otherwise assumed in the realm of international human rights guarantees: the right to "autonomy" and "the right to have rights" (in other words, the right to be recognised as a legal person).[71] At its core, universal legal capacity is a moral claim for equal treatment grounded in the inherent dignity of disabled people as holders of human rights. As Arstein-Kerslake puts it, the Convention "embraces a different notion of the 'human'" grounded in the reality of the human condition where different individuals have differing abilities.[72]

The search for a "correct" interpretation of art 12 may in any case be an arid one. As Series and Nilsson note, art 12 is *intentionally* ambiguous so as to appeal to both states parties and the disabled people involved in its negotiation. Its importance is that it has "created a powerful platform for difficult conversations about the nature and effects of restrictions on legal capacity experienced by disabled people worldwide," forcing re-

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[70] Arstein-Kerslake et al, *supra* note 39 at 411; Series, *supra* note 31 at 64–5.

[71] Frédéric Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?" (2008) 30:2 Human Rights Quarterly 494–516.

[72] Arstein-Kerslake, *supra* note 58 at 8.

examination of long-held assumptions built into legal systems.[73] For this reason the Convention is frequently touted as introducing or requiring a "paradigm shift".[74]

A new paradigm of legal capacity will not be implemented through doctrinal debate as to the scope of art 12. Rather, it will come through reform of criminal justice institutions. Such work appears to have reached a standstill – little progress has been made since the Convention came into force, and there remains steadfast resistance to the idea of universal legal capacity. In no sense do special criminal procedures seem to be under threat.

Answering the research questions posed in the introduction requires an examination of what makes criminal procedure *work*, and what makes it *stick*. State criminal justice institutions have arisen and are sustained via various historical processes, ideologies, cultural norms and group interests. The resulting institutions are replete with ideological assumptions (often shared by actors operating within those institutions), and are entrenched in ways that makes reform challenging. Furthermore, unlike the Committee's utopian and generalist proposal, state-level criminal justice institutions have a proven history of operation in practice (whether for better or worse). The prospects of successfully reforming criminal procedure to reflect universal legal capacity seem slim if state parties are required in doing so to leap into the unknown.

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[73] Series & Nilsson, *supra* note 7 at 341.

[74] See for example Paul Harpur, "Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities" (2012) 27:1 Disability & Society 1–14; Kristin Booth Glen, "Changing Paradigms: Mental Capacity, Legal Capacity Guardianship, and Beyond" (2012) 44:1 Columbia Human Rights Law Review 93–170; Peter Bartlett, "Implementing a paradigm shift: implementing the Convention on the Rights of Persons with Disabilities in the context of mental disability law" in *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (Washington: American University Washington College of Law, 2014) 169; Minkowitz, *supra* note 36 at 435; Series, *supra* note 31.

In light of the limits of any further doctrinal debate, I examine the barriers and opportunities to institutional reform of criminal justice systems though a "new institutionalist" approach. I outline the utility of that framework next, in chapter 2.

Chapter 2: Theoretical approach

This chapter sets out the theoretical approach I take throughout the balance of this thesis. The theoretical framework I have prioritised is that of *discursive institutionalism*.[75] This is an analytic "new institutionalist" political science approach focusing on "key moments of change" within complex institutions[76] such as criminal justice systems. In section 2.1 I first briefly explain the main schools of new institutionalism and their difficulty in accounting for post-formative institutional change. Section 2.2 then examines how discursive institutionalist thinkers theorise the interplay of new and destabilising ideas, such as universal legal capacity, with relatively settled institutions. In section 2.3 I explain how I seek to apply new institutionalist approaches in order to speculate as to the barriers and opportunities for institutional change to adversarial criminal justice systems. Finally, I address the inadequacy of other theories as to the internalisation of international law for answering my research questions in section 2.4.

2.1 New institutionalisms

New institutionalism is a group of theories which arose in response to the short-comings of behaviouralist political science approaches, which were primarily focused on examining politics through the aggregate views and actions of individual actors. New institutionalisms seek to explain why and how institutions arise, persist and change, as

[75] Also sometimes referred to as "constructivist institutionalism".

[76] Colin Hay, "Constructivist Institutionalism" in Sarah A Binder, R A W Rhodes, and Bert A Rockman, ed, *The Oxford Handbook of Political Institutions* (Oxford: Oxford University Press, 2008) fig 4.1.

structures with some degree of independence from the individuals acting within them, and thus how those institutions themselves influence policy outcomes.[77]

Different strands of new institutionalism prioritise different explanations for institutional emergence and persistence. Rational choice institutionalism (**RI**) tends to draw on economics and mathematics and assumes institutions are constructed by rational actors maximising their interests. Law and economics can be conceived of as an "indigenised" form of RI for legal institutions. Sociological institutionalism (**SI**) involves political agents implementing cultural norms in accordance with a "logic of appropriateness". RI and SI both have behaviouralist elements, based on logics of rationality and cultural appropriateness respectively, but recognise that the resulting institutions also play a constitutive role in policy, alongside the behaviour of actors within a polity.

Another branch of new institutionalism is historical institutionalism (**HI**), which emphasises the impact of historical aspects such as path dependence on the emergence and form of currently existing institutions. "Early choices have a persistent influence",[78] such that institutional forms of today may be explicable by tracing paths taken in the past. HI approaches tend to have clear relevance to scholarship about law reform projects. To take an obvious example of historical path dependence which shapes current legal institutions, legislating (or in the case of adversarial procedure, the codification of common law) tends to make law "stick", supporting rigidity in institutions reliant on that law, despite the emergence of changed circumstances which might challenge the coherence of an existing paradigm. And, as chapter 3 explores, some theorists see a law

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[77] Vivien A Schmidt, "Institutionalism" in Colin Hay, Michael Lister & David Marsh, eds, *The State: Theories and Issues*, 1st ed (Hampshire: Palgrave Macmillan, 2006) 98.

[78] John Hogan, "The Critical Juncture Concept's Evolving Capacity to Explain Policy Change" (2019) 5:2 European Policy Analysis 170–189 at 172.

enacted in 1696 as a crucial turning point down the "path" of adversarialism, compounded upon by many subsequent reforms.

Applying RI, SI and HI can uncover useful insights about institutions of all kinds. But they have been criticised by proponents of a fourth new institutionalism, discursive institutionalism (**DI**) for two main reasons: they are said to underplay the role of ideas and discourse in explaining policy outcomes, and to be better at explaining continuity than change. A historical approach to the adversarial criminal process, for example, helps us to understand why that institution takes its current form, but it does not give a good account of "post-formative institutional change"[79] because it tends to leave us with "unthinking" actors who behave in accordance with institutional structure. Similarly, SI tends to treat ideas as becoming internalised and contained within the minds of actors and the institutions they work in through socialisation, rather than treating ideas as a resource and actors as creative and capable of "bucking the system".[80] As Vivien Schmidt puts it, "action in institutions in [these three] new institutionalisms conforms to a rule-following logic, whether an interest-based logic of calculation, a norm-based logic of appropriateness, or a history-based logic of path dependence."[81] The power of new ideas to affect actors and established institutions is therefore undercounted and undertheorised by RI, SI and HI.

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[79] Hay, *supra* note 76 at 60.

[80] Martin B Carstensen & Vivien A Schmidt, "Power through, over and in ideas: conceptualizing ideational power in discursive institutionalism" (2016) 23:3 Journal of European Public Policy 318–337 at 325.

[81] Vivien A Schmidt, "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse" (2008) 11:1 Annual Review of Political Science 303–326 at 314.

2.2 Discursive institutionalism

These weaknesses call for a framework for examining the impact of the discursive deployment of new ideas on existing institutions. Discursive institutionalism treats institutions as "codified systems of ideas and the practices they sustain", which can change at times of "crisis" if the "ideational preconditions for institutional change" are met.[82] Institutions are treated as always both providing a given context for thinking and action, which constrain; but also as contingent, in that they result from the thoughts words and actions of the agents operating within them. They are both constitutive of the possibilities of future action, and constituted by (and contingent upon) agents' "background ideational abilities".[83] Ideas are not merely internalised (and then unquestioned) by actors and institutions, but rather exist as a resource to be drawn on – and actors are thought of less as dull products of social pressure, and more as creative and critical agents of both continuity and (potential) change. DI therefore gives ideas and discourse, and institutional agents, a significant role in the creation and change of institutions. This approach can be used alongside RI, SI and HI to recognise the full breadth of the institutional constraints on actors and processes of change.

Vivien Schmidt summarises the conditions under which new ideas can contribute to institutional change: "Discourses succeed when speakers address their remarks to the right audiences (specialized or general publics) at the right times in the right ways. Their messages must be both convincing in cognitive terms (justifiable) and persuasive in normative terms (appropriate and/or legitimate)."[84]

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[82] Hay, *supra* note 76 fig 4.1.

[83] Schmidt, *supra* note 81 at 314.

[84] *Ibid* at 313.

This summary begs the questions – who are the right audiences, when is the right time, and what is the right content? In other words, if "power" is "the ability of actors…to 'have an effect' upon the context which defines the range of possibilities of others,"[85] then what kinds of ideas have power, and how are those ideas assembled and deployed? Answering these questions requires an understanding of the types of ideas which are deployed in political discourses and their relation to each other, and the ideational power associated with those ideas.

Types of policy ideas

Mehta identifies three kinds of ideas which operate to influence policy outcomes. His narrowest type of idea is the "policy solution" – a specific implementable programme, such as reducing class sizes in primary schools. Policy solutions tend to rely upon or favour a given problem and objective, and therefore imply higher-level ideas which Mehta calls "problem definitions". For example, a problem definition that could throw up the "smaller class sizes" solution might be the idea that good educational outcomes depend on close work with teachers. Much political argument occurs at this level. Framing the possibilities of action is politically influential, because only certain sorts of policy solutions will be acceptable to address a chosen problem.[86]

More abstract still are ideas which cut across multiple areas of public policy, which Mehta describes as "public philosophies" (which may be in "open contest" for dominance) or "zeitgeist" (an overwhelmingly dominant public philosophy). These ideas

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[85] Colin Hay, *Political Analysis: A Critical Introduction* (Basingstoke, UK: Palgrave, 2002) at 185.

[86] Jal Mehta, "The Varied Roles of Ideas in Politics" in Daniel Béland & Robert Henry Cox, eds, *Ideas and Politics in Social Science Research* (Oxford University Press, 2010) 23.

could perhaps be more simply described as "collective ideas"[87] or, at the least contestable extreme, "assumptions" – ideas which structure thinking across multiple issues.[88]

This three-level typology of political ideas can be applied to policy problems arising within adversarial criminal procedure. To demonstrate this, take the following *problem definition*: how do we avoid revictimisation of witnesses through the adversarial trial process? Adversarial criminal procedure normally relies on a prosecutor calling the victim of an alleged crime as a witness, and permits cross-examination of that witness by the defendant or their counsel. But what if a self-represented defendant wants to cross-examine a "vulnerable" witness, such as a child or a complainant in a sexual assault case? This might have the effect of revictimising the witness, and indeed may be motivated by a desire to further harm that witness. One *policy solution* deployed to address this problem is to require a lawyer to conduct the cross-examination – either a lawyer instructed by the defendant, or an independent lawyer identified by the court.[89]

Competing *public philosophies* underpin the identification of problems which need to be solved by criminal procedure. The right to cross-examine each witness as the defendant sees fit reflects broader ideas of autonomy, fairness and truth-seeking, in order to make a full and effective defence to a criminal charge. Curtailing this right may be problematised as a deficit of procedural fairness. Freedom from oppressive cross-examination tends to

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[87] Jeffrey W Legro, "The Transformation of Policy Ideas" (2000) 44:3 American Journal of Political Science 419–432 at 420.

[88] Mehta, *supra* note 86.

[89] This example refers to the reforms enacted by the Youth Justice and Criminal Evidence Act 1999 (UK) and is discussed by Jenny McEwan, "Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial" in R A Duff et al, eds, *The Trial on Trial: Volume 1: Truth and Due Process* (London: Bloomsbury, 2004) 51 at 56–7.

promote an ideal of dignity of victims of crime, and suggests that the state is seeking to avoid inflicting psychological harm through a coercive process.

Change within and between paradigms

As noted in chapter 1, the idea that the Convention requires a "paradigm shift" has become widespread. New institutionalism is an insightful approach precisely because it has embraced the concept of "paradigm". The idea of "paradigm shift" was popularised by Thomas Kuhn in *The Structure of Scientific Revolutions*, which examined the process of scientific discovery. Kuhn says most "normal science" takes place within an accepted "paradigm" – essentially, a combination of "law, theory, application and instrumentation" which comes to define a tradition of scientific inquiry.[90] Normal science is a process of "puzzle-solving" within a paradigm, but sometimes this results in the identification of anomalies which cannot be explained by the paradigm. If these anomalies cannot be eliminated, they tend to reveal error in the governing paradigm and illustrate the need for a paradigm shift. A well-known example of scientific paradigm shift induced by unaccountable error is the abandonment of the geocentric (Ptolemaic) model of the solar system, in favour of a heliocentric (Copernican) model.

Peter Hall draws on Kuhn's scientific paradigm to describe a "policy paradigm" – "a framework of ideas and standards that specifies not only the goals of policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to be addressing."[91] Hall examined the transition from a Keynesian economic paradigm to a monetarist one in Britain between 1970-89, and described

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[90] Thomas S Kuhn, *The structure of scientific revolutions*, 4th ed (Chicago: University of Chicago Press, 2012) c II.

[91] Peter A Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain" (1993) 25:3 Comparative Politics 275–296 at 279.

change as occurring at three levels: *first-* and *second-order change*, which involve change to the settings of policy and the instruments of policy, respectively; and *third-order change* which involves a shift in the policy paradigm. First- and second-order change – "normal policymaking" – is akin to Kuhn's "normal science" or what Mehta would call "policy solutions". Third-order change between policy paradigms engenders a choice *between* paradigms.[92]

In his potted history of British economic policy, Hall suggests that yearly changes to macroeconomic settings, exemplified by the process of budget-setting, serves as an example of first-order policy change. Second-order change involved new or altered policy instruments which remained compatible with "the hierarchy of goals" assumed in Keynesianism. But that hierarchy of goals was unsettled entirely by the third-order change from Keynesianism (and its preoccupation with absorbing unemployment) to monetarism (which prioritises managing inflation). This shift necessitated the implementation of new policy solutions directed to the new answer to the question "what economic problem are we trying to solve?"

Exercising power through ideas

The most influential form of ideational power discussed by discursive institutionalists is power through ideas: that is, persuading people to adopt ideas through reasoning or argument.[93] The persuasiveness of an idea depends on the mustering of two types of argument in support:

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[92] Mehta suggests paradigms are at the same analytical level as "problem definitions", but the content of these will obviously be influenced by "public philosophies": Mehta, *supra* note 86 at 33.

[93] Carstensen & Schmidt, *supra* note 80.

1. *Cognitive arguments* depend for success upon defining problems and proposing adequate solutions. A proposed policy programme must demonstrate "seeming coherence, by making the concepts, norms, methods and instruments of the programme appear reasonably consistent and able to be applied without major contradiction."[94]
2. *Normative arguments* depend upon tapping into ideas of appropriateness, by appealing to values and common-sense images about causes of problems and their solutions. Normative arguments can mean that the "best" technical argument is not necessarily the most powerful – for example, Carstensen and Schmidt note that normative and value-laden imagery of "the household" and "belt-tightening" in times of economic crisis continues to hold sway despite the ineffectiveness of government-level austerity.[95]

The marriage of satisfying normative and cognitive arguments is crucial to the persuasiveness of a discourse. Berman captures this idea well:[96]

> *…ideologies face, Janus-like, in two directions at once: toward theory and practice, toward abstract ideas and everyday political realities. They achieve their greatest power and hegemony when they seamlessly relate one to another, offering adherents both a satisfying explanation of the world and a guide for mastering it.*

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[94] *Ibid* at 324.

[95] *Ibid*.

[96] Sheri Berman, "Ideology, History, and Politics" in Daniel Béland & Robert Henry Cox, eds, *Ideas and Politics in Social Science Research* (Oxford University Press, 2010) 105.

Criminologist Barbara Hudson applies the same normative/cognitive dichotomy when discussing the necessary features of criminal law: it must incorporate ideals, or contain an "ethical moment", in order to be viewed as *legitimate*; but it must also inhabit social realities, or contain a "political moment", if it is to be *effective*.[97]

But "it is not merely the ideas themselves that should be analysed, but the *debate* that lends them legitimacy and authority."[98] Power is expressed through ideas in different forms of discourse pursued by different types of actor. Schmidt identifies two types of persuasive discourse: *coordinative* and *communicative* discourse. Coordinative discourse occurs in the "policy sphere" – where policy is constructed – between civil servants, politicians, experts and activists. Communicative discourse occurs in the "political sphere" between politicians, government spokespersons, and the general public, and serves to legitimate policy proposals through a process of public information and debate.[99] These two forms of discourse could be otherwise described as relating to *private* persuasion (coordinative discourse, occurring largely out of public view) and *public* persuasion (communicative discourse).

The style of discourse deployed is also important to the success of a project. Wood suggests that *politicisation* (and its opposite, *depoliticisation*) are rhetorical strategies used by policy actors to attempt to move issues in and out of the realm of politics. Issues which are "political" are those regarded as contingent and subject to change through the

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[97] Barbara Hudson, "Punishing Monsters, Judging Aliens: Justice at the Borders of Community" (2006) 39:2 Australian & New Zealand Journal of Criminology 232–247 at 244.

[98] Matthew Wood, "Puzzling and powering in policy paradigm shifts: politicization, depoliticization and social learning" (2015) 9:1 Critical Policy Studies 2–21 at 8.

[99] Schmidt, *supra* note 81 at 310.

exercise of human agency, whereas depoliticised issues are "assumed to be inevitable".[100] Accordingly discourses of politicisation involve "disputing the underlying assumptions that guide society" whereas depoliticisation involves their entrenchment. These are particularly useful ways of analysing "pressures for policy change or stability that involve emotive, moralistic or normative appeals"[101] through methods such as sloganeering, rhetoric and storytelling.

Another form of policy discourse known as "social learning" or "puzzling" has more of a technical character, but not necessarily a deterministic one. Social learning finds its genesis in Heclo's reflection that politics "finds its sources not only in power but also in uncertainty – men collectively wondering what to do… Policy-making is a form of collective puzzlement on society's behalf".[102] The iterative nature of puzzling through problems means that new policy solutions at "time-1" are strongly influenced by "policy at time-0",[103] but a discursive institutional perspective also suggests that policy actors do not necessarily have a predictable mechanistic or rational response to evidence of prior policy success or failure – rather they are able to draw on a reservoir of ideas and deploy them in creative ways when coming up with new policy solutions, particularly in respect of second-order policy change.

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[100] Wood, *supra* note 98 at 10.

[101] *Ibid* at 11.

[102] Hugh Heclo, *Modern social politics in Britain and Sweden: from relief to income maintenance* (New Haven: Yale University Press, 1974) at 300.

[103] Hall, *supra* note 91 at 277.

Wood therefore proposes that *communicative discourses* of *(de)politicisation* are a strong driver (or inhibitor) of *third-order change*, whereas *coordinative discourses* of *social learning/puzzling* are more associated with *first-* and *second-order change*.[104]

Critical junctures

As for *when* new policy solutions or paradigms come to supplant old ones, it is useful to explore what is sometimes called a "critical juncture".[105] A moment of "crisis" which can give rise to a "critical juncture" in an institution may be an obvious "exogenous shock" such as an economic crash or a natural disaster, or a more gradual change such as demographic shifts or social movements which has led to the build-up of unresolved contradictions.[106] In all cases the crisis results in "anomalies" which existing paradigms do not adequately address.

But not all such crises necessarily act as critical junctures – many are followed by either continuity, or by first- or second-order change.[107] In other words, orthodoxies can be reasserted through times of crisis through the deployment of new policy solutions reliant on the same paradigmatic presumptions. Furthermore, the need for a "critical juncture" to drive change relies somewhat on the idea that something fundamental about the existing paradigm and the potential replacement paradigm is "incommensurable". The assumption of incommensurability between paradigms, central to this model of change, has been critiqued in recent years as an over-simplification. In reality we are often faced

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[104] Wood, *supra* note 98 at 12.

[105] Hogan, *supra* note 78.

[106] *Ibid* at 180.

[107] *Ibid* at 172.

not with two paradigms with wholly independent accounts of how the world operates,[108] but rather a dominant paradigm which shifts more gradually over time, becoming less and less ideologically "pure" as actors absorb critiques, deploy new ideas, and puzzle their way to new policy solutions. The result is something of an "ideational bricolage" replete with compromises and exceptions, which (perhaps counterintuitively) can *add* to a system's strength and coherence.[109]

The "creative" agent idea at the core of discursive institutionalism, and the fact that much institutional change can occur gradually, suggests that, since ideas are a resource to be drawn upon in the course of first- and second-order change, the "right time" to press for change is "always". Nevertheless, critical junctures remain useful to explain conflicts between more "incommensurable" paradigms where high-level ideational change is required before substantial institutional change can occur.

Legro suggests that there are two elements to sustained ideational change: extant ideational collapse (prompted by a crisis), followed by new ideational consolidation – and that change will depend on whether policy actors can reach consensus as to the new system of ideas.[110] A "critical juncture", for Hogan, is when both of these elements are present and result in third-order change; if no new ideational consolidation can be reached then the likely result is further policy experimentation within the existing paradigm (that is, first- or second-order change).[111]

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[108] Hall, *supra* note 91 at 280.

[109] Martin B Carstensen, "Bringing Ideational Power into the Paradigm Approach: Critical Perspectives on Policy Paradigms in Theory and Practice" in John Hogan & Michael Howlett, eds, *Policy Paradigms in Theory and Practice* (Basingstoke, UK: Palgrave Macmillan, 2015) 295 at 298–301.

[110] Legro, *supra* note 87.

[111] Hogan, *supra* note 78 at 180–1.

2.3 Methodology

A useful methodological approach to examining my two research questions will be appropriate to the subject matter and to the conditions, as well as being achievable in scope. The usefulness of a new institutionalist approach is illuminated by Gerard Quinn, currently the UN's Special Rapporteur on the Rights of Persons with Disabilities, who suggests there is currently a disconnect between changing ideas of disability and institutional structures:[112]

> *Systems do not necessarily change just because headline ideas do. We need deep systems change to ensure that new ideas actually reach the small places where people live.*

Exploring the dynamics of institutional stability and change through DI can involve examining both ideas and discursive interactions.[113] This project cannot engage with a closed dataset of concluded events. Rather I am interested in offering answers to speculative questions about criminal procedural reform grounded in art 12. In the absence of concerted efforts to pursue universal legal capacity reforms in criminal justice systems outside of the tentative suggestions offered in some academic writing, there is limited scope to systematically examine discursive interactions.[114] As noted above in section 1.5, procedural codification means there is no real prospect of the direct application of universal legal capacity within adversarial criminal procedure, and thus

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[112] *COSP13 - Statement by Mr. Gerard Quinn, Special Rapporteur on the Rights of Persons with Disabilities* (United Nations Department of Economic and Social Affairs, Division of Inclusive Social Development, 2020).

[113] Schmidt, *supra* note 77 at 113.

[114] It is possible that the proceedings (discussion documents, submissions and reports) of a law reform commission considering the challenge art 12 poses to adversarial criminal procedure could a systematic discursive examination of

examination of the behaviour or discourses deployed by institutional actors in the course of criminal proceedings cannot effectively address my research questions.

I therefore limit my analysis to the interplay/commensurability of established and emergent ideas, and speculate as to the deployment of those emergent ideas in future political discourses, by:

1. Excavating the normative ideas which legitimate adversarial criminal procedure, and the cleavage with universal legal capacity (chapter 3);
2. Establishing the need for third-order change to adversarial criminal procedure in order to fully realise universal legal capacity (section 4.1);
3. Positing three high-level expressions ("models") of universal legal capacity in criminal procedure, and examining the challenges inherent to adoption of each (sections 4.2 – 4.3); and
4. Speculating as to the necessary features of a successful communicative and co-ordinative discourse of universal legal capacity (section 4.4).

It would be too simplistic to suggest that incommensurable ideas alone explains institutional inertia in the criminal justice domain. Schmidt suggests DI can readily be deployed amongst other new institutionalist approaches, noting that "to understand the complexity of reality requires as many perspectives as possible and thus as many methods as appropriate."[115]

In particular, as already noted above, HI and SI approaches can illustrate how a history-based logic of path dependence and a norm-based logic of appropriateness can help to

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[115] Vivien A Schmidt, *Democracy in Europe: The EU and National Polities* (Oxford: Oxford University Press, 2006) at 7.

determine institutional boundaries and rules, and give rise to institutional stability. Further, the strength of the paradigmatic ideas which Convention advocates seek to disrupt cannot be explored without reference to their contingent entrenchment through historical processes, and the acculturation of institutional actors to those norms. DI is useful because it helps to explain why and how institutions *nonetheless* change, and the role of disruptive new ideas in that process. I therefore make use of historical and sociological approaches to help explain institutional inertia, and discursive institutionalist approaches to explore the potential for institutional change.

An RI approach has limited explanatory power in relation to the institutional emergence, stability and change of adversarial criminal procedure. RI seeks to identify "rational" institutional actors' interests and explain their behaviour in the context of a particular institutional setting.[116] But since institutional actors are bound to divert certain people with cognitive disabilities into special criminal procedure by procedural codes, case-by-case analysis cannot meaningfully inform my research questions. Further, institutional emergence and change are explained by RI in terms of the facilitation of collective action (eg, a rational, quasi-contractual way of rational actors working through the pursuit of their interests together)[117] which involves "purely instrumentalist conceptions of law and politics" – that is, a reservoir of reasons which can be drawn on to justify the pursuit of interests, rather than acting as a driver of change.[118]

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[116] Schmidt, *supra* note 77 at 102.

[117] *Ibid* at 102–3.

[118] Cornell W Clayton, "The Supreme Court and Political Jurisprudence: New and Old Institutionalisms" in Cornell W Clayton & Howard Gillman, eds, *Supreme Court Decision-Making: New Institutionalist Approaches* (Chicago: University of Chicago Press, 1999) 15 at 39.

In a similar vein, the largely neoclassical law and economics approach is particularly critiqued as having little useful analytical power with regard to serious criminality. George Fletcher suggests that avoidance of serious sexual or violent offending cannot usefully be analysed as "cost-driven" in the way regulatory offences which reduce the risk of accidents are. It is simply not discursively acceptable to suggest that the economic costs of preventing murder, rape and violence are "too high". Furthermore, models of rational behaviour are not easily applicable to mystifying violent behaviour which sits outside of morality – we "cannot reduce its motivations to the simple model of the consumer in the marketplace".[119]

Materialist analysis can help to explain the limitations of proceduralist human rights approaches to disability. For example, Marta Russell explores how anti-discrimination "equal opportunities" legislation fails to create employment for disabled people, due to the contradictions of class-based society.[120] But in respect of demands for the change of adversarial criminal procedure, such analysis can explain little. Essential and enduring legal relations such as contract and property rights might be explained and sustained by a capitalist mode of production.[121] And new criminal offences aimed at the substantive defence of the propertied class might be called into existence by a Parliament dominated by that class.[122] But as Stone notes (while defending the utility of a Marxist analysis of law), criminal law is "far less important to the maintenance and functioning of the

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[119] George P Fletcher, *The Grammar of Criminal Law: American, Comparative, and International: Volume One: Foundations*, 1st ed (Oxford: Oxford University Press, 2007) at 59–61.

[120] Marta Russell, *Capitalism and Disability: Selected Writings by Marta Russell*, Keith Rosenthal, ed (Chicago: Haymarket Books, 2019) c 6.

[121] Alan Stone, "The Place of Law in the Marxian Structure-Superstructure Archetype" (1985) 19:1 Law & Soc'y Rev 39–68.

[122] Douglas Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1975) c 1.

capitalist social order than parts of the civil law", and for the most part criminal law simply "serves the needs of ordinary people who suffer from crime."[123] Similarly, Damaška notes the lack of necessary correlation between mode of production and the form of criminal procedure within a society.[124]

Accordingly, I conclude it would be a mistake to privilege materialist explanations while treating ideas and ideology as "mere epiphenomena"[125] with little significant impact on criminal procedure.

2.4 Norm internalisation theories

Finally, it is necessary to address why leading theoretical models for the internalisation of international human rights norms are unsuited to my research questions.

Many theoretical approaches to the internalisation of international law are too high-level, or too focused on state-state interactions, to provide much assistance in answering my research questions. For example, my inquiry could be seen as part of the last step in what Koh calls the "transnational legal process" by which global human rights norms are debated at an international institutional level, interpreted, and eventually internalised by states.[126] This thesis assumes the idea of universal legal capacity in criminal procedure, albeit contested, is already established and interpreted through the

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[123] Stone, *supra* note 121 at 40.

[124] Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1991) at 6–8.

[125] Berman, *supra* note 96 at 105.

[126] Harold Hongju Koh, "How Is International Human Rights Law Enforced?" (1999) 74:4 Indiana LJ 1397–1417 at 1399.

international institutional process. Koh's approach does not address how such a claim is to finally be substantively internalised to a particular domestic setting.

One explanation offered for the successful adoption of rights-based models of disability by Canada and the European Union is that internalisation occurred partly through the exercise of federal or supranational power (respectively) to agree and impose human rights guarantees relating to disability equality, which aligned with those law-makers' desire to expand their influence.[127] But the fact that the social model has been equally accepted in unitary states such as New Zealand suggests this is a correlation with little meaningful explanatory power.

The spiral model

Perhaps the most sophisticated attempt to analyse the domestic incorporation of international human rights norms is the "spiral model" proposed by Risse, Ropp and Sikkink. Those authors propose a five-stage process by which states internalise international norms, through co-ordinated pressure from domestic civil society and transnational advocacy networks: from state *repression*, to *denial* of the validity of norms, to *tactical concessions*, and then acceptance of the norms through legal means (*prescriptive status*), and finally *rule-consistent behaviour* on the part of the state.[128] Risse Ropp and Sikkink hold that states will often start to internalise international human rights norms for cynical or instrumental reasons (*tactical concessions*), but this initial step opens the door to argumentation on the part of those who seek to more meaningfully internalise those

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[127] R Daniel Kelemen & Lisa Vanhala, "The Shift to the Rights Model of Disability in the EU and Canada" (2010) 20:1 Regional & Federal Studies 1–18.

[128] Thomas Risse & Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction" in Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *The Power of Human Rights: International Norms and Domestic Change*, 1st ed (Cambridge: Cambridge University Press, 1999) 1 at 20.

norms. States "become entangled in arguments" and the socialisation of human rights norms is then achieved not by dangling benefits in front of a rational actor or using shame, but rather through "argumentative rationality, dialogue, and processes of persuasion".[129] In other words, norms come to be accepted as valid and internalised by states (at least in part) because they are *convincing*.

The spiral model seems to best "fit" the internalisation of human rights norms by states who lack democratic institutions and an associated culture of human rights. The 11 states which Risse, Ropp and Sikkink track against their model (which include Chile, Indonesia, the Philippines, and Czechoslovakia) all initially lacked fundamental features of democratic accountability, with most being party or military dictatorships and one, South Africa, being an apartheid state. Establishing the rule of law and sustained political transformation is acknowledged by the authors as a usual prerequisite for human rights improvement, and the model is premised on the emergence of "transnational advocacy networks" which "alert Western public opinion and Western governments."[130]

This can be contrasted to "conflict of rights" situations, such as the one we are confronted with here, in states with adversarial systems where "fair trial" is *premised* on reasoned participation in the criminal process. Human rights norms of procedural fairness are therefore already reflected by criminal procedure in such states; the question is whether and how new norms can supplant existing ones.

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[129] *Ibid* at 16.

[130] *Ibid* at 3–4; see also Beth A Simmons, "From ratification to compliance" in Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *The Persistent Power of Human Rights* (Cambridge: Cambridge University Press, 2013) 43 at 45.

The human rights measured by proponents of the spiral model are fundamental ones of personal and physical integrity,[131] and are comparatively programmatically simple when compared to universal legal capacity; for example, the policy programme required of states adopting the Convention Against Torture is refraining from torture and providing for the investigation and punishment of torture, as the text of that convention suggests. A programme of criminal procedural reform can only be implied from art 12. This programmatic void is addressed further in chapters 3 and 4. Further, the "tactical concession" most often measured by those applying the spiral model is ratification of the treaty at issue[132] – but the Disabilities Convention was quickly ratified by almost every UN member state.

Acculturation

Other authors propose a significant role for "acculturation". Goodman and Jinks aim to demonstrate that a great deal of international social influence on states cannot be explained by material or persuasive drivers, and therefore much adoption of international human rights norms occurs due to social pressure on the micro level – that is, by influencing individual actors within states such as government officials, journalists, and activists. In this way "macro-level phenomena", such as international treaty-making or interpretation, causes macro-level change at the state level, such as changes in state policy, via micro-acculturation of state actors with the influence to cause change.[133]

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[131] Simmons, *supra* note 130 at 59.

[132] *Ibid*.

[133] Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, 2013) at 40.

It seems clear enough that material inducement poorly explains human rights internalisation. The absence of any obvious direct or indirect material pressure for states to implement art 12 of the Convention in criminal procedure suggests a "material inducement" explanation is also of little relevance to my research questions. Human rights treaties in particular lack an "incentive"-based enforcement mechanism; to the contrary, foreign aid has tended to be provided on the basis of exigency rather than compliance with fundamental human rights.[134]

But Goodman and Jinks also largely dismiss the power of "persuasion". In their estimation, persuasion would involve domestic adoption of a norm based on its convincing nature and good fit for local conditions, and would be expected to produce a "tight fit" between state structures and policies, and the functional and social demands of each state. If "decoupling" of policies and needs occurs, and similar structures are adopted at similar times across states with vastly differing functional and social demands, this signals that acculturation rather than persuasion has occurred.[135] Goodman and Jinks suggest by way of example that broad convergence in domestic constitutional structures and human rights instruments, as well as primary and secondary educational systems and their teaching content, is difficult to explain on the basis of "persuasion" alone.[136]

Finnemore and Sikkink similarly argue that in large part norms are internalised by states according to a logic of "appropriateness". Norm emergence is the initial "persuasive" stage in this process, where actors attempt to convince a critical mass of states to adopt a

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[134] Beth A Simmons, *Mobilizing for Human Rights : International Law in Domestic Politics* (Cambridge [U.K.]: Cambridge University Press, 2009) at 122.

[135] Goodman & Jinks, *supra* note 133 at 43–46.

[136] *Ibid* c 4.

new norm. A "norm cascade" follows, which Finnemore and Sikkink suggest occurs due to "a combination of pressure for conformity, desire to enhance international legitimation, and the desire of state leaders to enhance their self-esteem". After the cascade stage, the norm is internalised – it is no longer controversial and becomes part of a state's accepted wisdom.[137]

While a norm cascade may eventually occur in respect of universal legal capacity, acculturation has little explanatory power to explain the conditions for change where international norms are yet to be converted into state-level policy solutions. There is, as yet, no critical mass in support of a universally accessible criminal procedure in adversarial jurisdictions, and no model of change that could be easily implemented. At this stage, then, there has been only "thin" internalisation of universal legal capacity. In my assessment, if universal legal capacity is to be realised, the policy-makers of a first-moving state will need to be convinced that a universally accessible criminal procedure is not just appropriate (normatively appealing) but *workable* (cognitively appealing). Persuasion remains necessary to convert an idea into a "norm". Finnemore and Sikkink frankly acknowledge the shortcomings of "acculturation", which reflects the same critiques that discursive institutionalists make of SI: it is "better at explaining stability than change."[138]

2.5 Conclusion

I have endeavoured to show how a new institutionalist approach directly engages with the "paradigm shift" claim advanced by Convention advocates. Prioritising a DI

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[137] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 International Organization 887–917.

[138] *Ibid* at 888.

approach allows for the examination of new and destabilising ideas on established adversarial criminal justice institutions. As indicated in section 2.3 above, I now apply a new institutionalist approach over the course of chapters 3 and 4 which charts the historical and sociological factors lending stability to adversarial criminal procedure, and the conditions for change in accordance with the new idea of universal legal capacity.

Chapter 3: The challenge of excising rationality from criminal law

Autonomy and rationality are generally treated as a single concept in law – that is, the freedom to act autonomously subsumes an implicit assumption of rationality (or rather, the *capacity for reason*). Autonomy-rationality[139] is an assumption lying at the heart of both adversarial procedure *and* substantive criminal law. Advocates of universal legal capacity suggest autonomy-rationality should be disaggregated if the fundamental human rights of disabled people are to be realised (see section 3.1). In this chapter I suggest that, as yet, Convention advocates have failed to make a persuasive case which could allow such a foundational concept to be dislodged from criminal law.

In section 3.2 I posit that fairness in truth-seeking lends legimitacy to criminal procedure. Defendant subjecthood is one of the main features which distinguishes adversarial modes from inquisitorial ones. Fairness in adversarial procedure is achieved in part (and thus the procedure is legitimated) via defendant subjecthood.

Section 3.3 demonstrates how this procedural approach is historically contingent – an example of institutional "path dependence" ultimately stemming from 17th century events and reforms. This historical survey explains why adversarial criminal procedure has the features it has now. But there is nothing *inevitable* about the resulting procedural codes – they could be reformed by willing political actors. Nothing in the historical development of adversarial criminal procedure definitively forecloses upon institutional reform. As I go on to explore in chapter 4, there are potential models of change to

[139] I describe these two linked ideas as "autonomy-rationality" throughout in order to make clear when I am discussing the classical expression of this idea.

criminal procedure which achieve universal accessibility by *removing* defendant subjecthood – and under such approaches fairness can be achieved in different ways.

While procedural reform is not foreclosed by those historical processes, I suggest that any reform *reliant* on the disaggregation of autonomy-rationality will likely falter. As section 3.4 explains, this idea is entrenched in criminal law at a deeper level than mere procedure; rather it is central to broadly-held conceptions of criminality and justice. The concept of autonomy-rationality therefore lends coherence to both procedural and substantive aspects of criminal law within adversarial systems; it is a *zeitgeist* idea.

In section 3.5 I draw these threads together to suggest that proponents of universal legal capacity have not advanced this idea with the level of coherency necessary to found a persuasive discourse which could effectively disaggregate autonomy-rationality in criminal law.

3.1 Universal legal capacity as an affirmation of personhood

An important motivating factor underlying the idea of universal legal capacity is upending entrenched conceptions of "personhood". As Shildrick puts it, witnessing impairment "lays bare the psychosocial imaginary that sustains modernist understandings of what it is to be *properly human*"[140] (emphasis added). The Convention promotes a "human rights-based model" of disability,[141] and such approaches "connect legal personality to any *human*, regardless of their individual capacities"[142] at the level of

[140] Shildrick, *supra* note 51.

[141] Committee on the Rights of Persons with Disabilities, *supra* note 10 at para 3.

[142] Lucy Series, "Relationships, autonomy and legal capacity: Mental capacity and support paradigms" (2015) 40 International Journal of Law and Psychiatry 80–91.

"inherent" right.[143] The goal of a cultural critique of social barriers is not to minutely tinker with the settings of criminal procedure, or with any other legal institution – rather it is to remake those aspects of our collective imagination which give rise to alterity. According to such an approach, expressions of human cognition ought no longer be viewed as either "normal" or "disordered", but as merely different subjectivities with equal validity.[144]

As a result, despite the split between art 12(1) (which affirms legal personality) and art 12(2) (which relates to legal capacity), Convention advocates often collapse questions of humanity, and moral and legal personhood, into one inquiry in which denial of legal agency, and the opportunity to take criminal responsibility, is also seen as denying moral personhood and, effectively, species membership.[145] Seen in this way, much depends on the idea of universal legal capacity. For example, Arstein-Kerslake claims anything short of universal legal capacity is "functionally equivalent to denying personhood" because of the failure to respect an individual's autonomous choices.[146] She suggests no test of cognition ought to be necessary before personhood is recognised, and thus it is illegitimate to effectively deny personhood through law by preventing someone making decisions about their daily life or refusing to hold them responsible for their actions.[147] The "existence or potential for cognition is virtually unknowable",[148] Arstein-Kerslake

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[143] Eilionoir Flynn & Anna Arstein-Kerslake, "Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity" (2014) 10:1 Int'l J L Context 81–104.

[144] Minkowitz, *supra* note 36 at 445.

[145] *Report of the Special Rapporteur on the rights of persons with disabilities*, by Human Rights Council, A/HRC/37/56 (United Nations, 2017) at para 14.

[146] Arstein-Kerslake, *supra* note 58 at 38.

[147] *Ibid* at 48.

[148] *Ibid* at 47.

says, so "personhood must be – to some degree – liberated from 'cognition'".[149] Quinn similarly describes "the fixation on rationality as the touchstone of legal capacity" as "one of the sins of the Enlightenment…a tying of personhood to cognition or cognitive ability."[150] Quinn sees the Convention's innovation as "treating persons with disabilities as 'subjects' with full legal personhood as distinct from 'objects' to be managed and cared for."[151]

I return to the claimed link between personhood and legal capacity advanced by Convention advocates in section 3.5 below, but it is first necessary to set out how autonomy-rationality has been broadly incorporated into both procedural and substantive criminal law doctrines.

3.2 Autonomy-rationality in adversarial criminal procedure

The fitness to stand trial test, outlined in chapter 1, is strongly associated with adversarial criminal procedure, to the point that it can be regarded as a universal feature of common law systems.[152] Adversarial criminal procedure, with its emphasis on tactics, pleading, party control of evidence and other forms of active participation by the defendant, is uniquely reliant on the defendant's autonomous decision-making.[153] Even apparently passive acceptance of proceedings (for example, through refusal to plead, cross-examine

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[149] *Ibid* at 41.

[150] Gerard Quinn, *Liberation, Cloaking Devices and the Law: Or a Personal Reflection on the Law and Theology of Article 12 of the UN CRPD* (Sofia, Bulgaria, 2013) at 17.

[151] Gerard Quinn, "A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities Part I: Articles and Short Commentaries" (2009) 1 Eur YB Disability L 89–114 at 90.

[152] Samuel Adjorlolo & Heng Choon (Oliver) Chan, "Determination of Competency to Stand Trial (Fitness to Plead): An Exploratory Study in Hong Kong" (2017) 24:2 Psychiatry, Psychology and Law 205–222 at 207.

[153] Ellen E Sward, "Values, Ideology, and the Evolution of the Adversary System" (1988) 64:2 Ind LJ 301–356 at 324.

or lead one's own evidence) is presumed to result from a defendant's reasoned decision to respond to charges by "putting the prosecution to proof"; in other words, standing mute is presumed to be a *tactic*[154] unless unfitness to plead is proven.

Adversarial criminal procedure (sometimes referred to as "common law", "Anglo-Saxon" or "Anglo-American") is often defined in opposition to inquisitorial procedure (sometimes "Roman" or "continental"). These two terms can be thought of as representing different "ideal types" of procedure in state criminal justice systems. No single perfect expression of these ideal types can be found amongst actually-existing systems of criminal procedure:[155] common law jurisdictions have diverged since the modern criminal trial emerged, and inquisitorial systems have also over time adopted adversarial features. But the universality of fitness to stand trial requirements within common law jurisdictions suggests deep common assumptions which can be regarded as emblematic of the adversarial procedural tradition.

The centrality of autonomy-rationality to adversarial procedure is often held to reflect dominant assumptions about relationships between the state, the criminally accused, and the victim of crime, as well the purposes of criminal procedure, while different assumptions can be distilled from inquisitorial systems. For example, Garapon contrasts the French attitude towards social links which he describes as membership of a common

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[154] Carl M Selinger, "Criminal Lawyers' Truth: A Dialogue on Putting the Prosecution to Its Proof on Behalf of Admittedly Guilty Clients" (1978) 3 J Legal Prof 57–106.

[155] Ideal-type procedure does not concretely exist, but can help us to categorise actually-existing systems and change within those systems: Chrisje H Brants & Allard Ringnalda, *Issues of Convergence: Inquisitorial Prosecution in England and Wales?* (Nijmegen: Wolf Legal Publishers, 2011). An alternative "lowest common denominator" approach to identifying inquisitorial or adversarial systems by their common features has less utility, being purely descriptive and failing to address why particular features conform or not to an ideal type: Máximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure" (2004) 45:1 Harv Int'l LJ 1–64 at 7–9.

political community (*communauté politique*), with an American conception of society as a chain of contracting individuals (*société contractuelle*). A proceeding is a ruthless "game" or "battle"[156] amongst equals under the contractual model, where the cost of losing is a predictable penalty which allows for contracting parties to make (theoretically) rational choices about breach of the law; whereas the French system is more akin to ceremonial group confrontation of a wayward member, with the goal of reintegration to the group.[157] Damaška similarly describes two extreme "contrasting dispositions of government": the "activist" management of society, on the one hand, and on the other merely providing a "framework for social interaction" akin to Garapon's contractual model.[158] The latter lends itself to a conflict-solving procedural model; whereas an "activist" disposition supports a policy-implementing inquisitorial model, less concerned with the parties' positions than with the state's policy goals.

Adversarial systems are distinguished chiefly by their regard of criminal defendants as the *subjects* of criminal process, not merely *objects* – and competence is the "first, and most basic, requirement of autonomy" in that process.[159] This deep assumption of autonomy-rationality is evident in the war and sports metaphors commonly used to describe adversarial trials – two-sided conflicts with rules, winners and losers. As Elizabeth Thornburg notes, "its name begins to tell the story": the "adversary" of the

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[156] Similarly Griffiths, critiquing the two supposedly exhaustive "models" of criminal process proposed by Herbert Packer, characterises both as variants of "the Battle Model": John Griffiths, "Ideology in Criminal Procedure or a Third Model of the Criminal Process" (1969) 79:3 Yale LJ 359–417.

[157] Antoine Garapon, *Bien juger: Essai sur le rituel judiciaire* (Paris: Odile Jacob, 1997) at 166–7, 174–6.

[158] Damaška, *supra* note 124 at 71.

[159] Marcus Dirk Dubber, "The Criminal Trial and the Legitimation of Punishment" in R A Duff et al, eds, *The Trial on Trial: Volume 1: Truth and Due Process* (London: Bloomsbury, 2004) at 55–6.

adversarial system is conceived of as an opponent in battle.[160] The ubiquity of war or sports metaphor reflects the idealised autonomous subject of the legal system, but the word "adversary" also evokes a contest which is *fair*. Each side of the conflict is an "adversary", not just the defendant, and for a fair fight both ought to have certain common capacities. A victory attained by a party vastly better armed or with greater natural capacities than their opponent evokes instinctive distaste because there has been a departure from fairness – it is not a fair contest between adversaries when soldiers battle civilians in war, or adults compete against children in sports. As Nussbaum notes, when people are not "rough equals" due to an "asymmetrical weakness", they are prone to be "either dominated or treated with charity."[161] The language of "aggressor" and "victim" becomes more apt to describe such cases.

A basic capacity for self-governance is widely seen as an essential element of procedural fairness in the adversarial tradition.[162] While an adversarial contest therefore evokes procedural fairness, a particular formulation of procedural fairness – the "minimum requirements" of a fair trial – will not necessarily be sufficiently distinctive to define the resulting proceedings as "adversarial". Procedural fairness rights such as the presumption of innocence and the concept of a "fair" trial are often loosely associated with "the adversarial tradition",[163] but these ideas have also found their way into international law of general application,[164] and can be integrated into inquisitorial

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[160] Elizabeth G Thornburg, "Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System" (1995) 10:2 Wis Women's LJ 225–282.

[161] Martha C Nussbaum, *Frontiers of justice: disability, nationality, species membership* (Cambridge, Mass: The Belknap Press, Harvard University Press, 2006) at 148.

[162] I discuss this further in section 3.3 below.

[163] Jacqueline S Hodgson, *The Metamorphosis of Criminal Justice: A Comparative Account* (New York: Oxford University Press, 2020) at 55–6.

[164] See for example European Convention on Human Rights, art 6.

systems without necessarily departing from those systems' traditional methods of investigation and proof. So, while the precise detail of procedural fairness guarantees may not necessarily be exclusive to the adversarial mode, we can more safely conclude that fairness in the operation of adversarial procedure can only be attained if its subjects are genuinely autonomous. That is why for J, the man I described in the introduction, the use of special criminal procedures was found to be non-discriminatory – his lack of capacity to stand trial meant that procedural fairness could not be achieved within the normal criminal trial process.[165]

It is similarly difficult to identify any actually-existing "ideal" inquisitorial system, but we can best define such a system by reference to its fundamental attitude towards litigant autonomy. An ideal inquisitorial system treats a defendant as the *object* of an investigation and trial procedure instigated and managed by the state, rather than the *subject* of a procedure instigated by a public or private prosecutor and contested before a neutral "referee" judge and "fact-finding" jury.

In light of this orientation, we can distil certain core features of inquisitorial procedure which oppose the autonomous "ideal" of the party-driven adversarial model:

1. *No requirement to plead:* contrary to the need in adversarial systems to enter a plea of guilty or not guilty to the charges laid, the ideal inquisitorial system knows no such thing as pleading.[166] This means that a trial (of some length) is always necessary, no matter how "open and shut" a case may seem.[167] Lacking a need to

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[165] *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2018] NZHC 1209, at [506]-[573].

[166] Langer, *supra* note 155 at 11.

[167] Peter J van Koppen & Steven D Penrod, "Adversarial or Inquisitorial: Comparing Systems" in Peter J van Koppen & Steven D Penrod, eds, *Adversarial versus Inquisitorial Justice: Psychological Perspectives on*

"plead" also means that plea bargaining, another complexity of adversarial justice requiring consequential reasoned decision-making by defendants, is absent in the ideal inquisitorial system, although a confession may helpfully shorten a trial.[168]

2. *Mode of investigation:* a prosecutor or investigating magistrate assembles a dossier about the alleged offending, which is used to determine whether to bring a particular charge to trial.[169] The defence is not burdened with the gathering of evidence (or the leading of witnesses at trial); it is the responsibility of the judicial or state investigator to appropriately pursue potentially exculpatory lines of inquiry.[170]
3. *Mode of trial:* the court directs proceedings on the basis of the charge and the dossier, relying heavily on the written evidence to determine who is questioned and why. Witness examination is therefore not a mandatory feature of the inquisitorial trial. There is no division between fact-finder and judge, but the court may be constituted in various ways (a judge, a panel of judges, or a mixed jury of judges and laypersons). Contrary to the detailed rules of evidence found in adversarial systems, all evidence in the dossier can be routinely admitted in an ideal adversarial system, and simply weighed by the court on the basis of its quality.[171]

Criminal Justice Systems (Boston: Springer, 2003) 1 at 8–9; Langer, *supra* note 155 at 11; Andrés Torres, "From Inquisitorial to Accusatory: Colombia and Guatemala's Legal Transition" (2007) 4 Law and Justice in the Americas Working Paper Series.

[168] Hodgson, *supra* note 163 at 17.

[169] van Koppen & Penrod, *supra* note 167 at 9–11.

[170] Stewart Field & Andrew West, "Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process" (2003) 14:3 Criminal Law Forum 261–316 at 264.

[171] van Koppen & Penrod, *supra* note 167 at 11–12.

As such, an inquisitorial approach theoretically eliminates much of the cognitive burden on a defendant to play a part in ensuring the discovery of truth and a procedurally fair trial, by removing any duty to respond to the charges laid by way of pleading or active participation in the trial process.

Modern criminal procedure of either adversarial or inquisitorial character can be seen as an "interrelated system of guarantees of truth-finding and fairness".[172] Those dual features are necessary for procedural legitimacy, and their pursuit cannot be said to be a distinct feature of either system. The adversarial system is often defended as best at discovering "the truth" – see for example Wigmore's often-quoted claim that cross-examination is the "greatest legal engine ever invented for the discovery of truth"[173] – but this claim is easy to problematise[174] and is indistinct, being similarly applicable to the exhaustive pre-trial evidence-gathering process seen in ideal inquisitorial systems. Similarly, "fairness" is essential to systemic legitimacy, but is achieved in inquisitorial procedure by scrupulous independence of prosecutors and judicial officers and relatively exhaustive fact-finding, as opposed to the party-participation requirements of adversarial procedure.[175]

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[172] Brants & Ringnalda, *supra* note 155.

[173] John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada*, 2nd ed (London: Little, Brown, 1923) at 27.

[174] Sward, *supra* note 153 at 316–7.

[175] Different views of the importance of litigant autonomy as the most distinctive ideological feature of adversarial and inquisitorial criminal procedure reflects Ellen Sward's conclusion as to the ideology underpinning adversarialism: Sward, *supra* note 153; See also Hodgson who suggests adversarialism can be defined by "choice or control of the case on the part of the accused": Hodgson, *supra* note 163.

3.3 The emergence of adversarial criminal procedure

Modern common law systems now include a public prosecutorial corps, but this overlay obscures the original parties to this "contractual" model – it was the victim, not the Crown, who was the "driver" of the English criminal trial in the early modern period. Langbein describes the English felony trial procedure at this time as an "altercation": a "lawyer-free contest between citizen accusers and citizen accused" in which evidence was led in piecemeal by accusers and responded to in turn by the defendant. Because the defendant was required to orally rebut the prosecution, Langbein also refers to this as the "accused-speaks" trial.[176] Sixteenth- and seventeenth-century England had no public prosecution service. Lawyers were only rarely instructed by private prosecutors (victims) bringing felony charges, and were banned altogether from representing defendants. The one circumstance where a public servant always acted as prosecuting counsel was in treason trials, which concerned a threat to the monarch (who could in any case not appear in person in their own court, and so was represented by the Attorney- or Solicitor-General and other crown counsel).[177] The exclusion of defence counsel from the altercation trial was justified on the basis that the court would act as counsel for the defendant on any matter of law which arose, and that otherwise the issues were factual ones to which even an unskilful defendant could properly address his evidence. In other words, it required "no manner of Skill to make a plain and honest Defence".[178]

Altercation trials tended to be simple and fast: there was no equivalent to the complex modern rules of evidence, instructions to juries tended to be abbreviated and simple, and

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[176] John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2005) c 1.

[177] *Ibid* at 12–13.

[178] *Ibid* at 34, 168.

guilty pleas were discouraged (including by the judiciary) due to the subsidiary use of the trial as a forum for eliciting mitigating evidence that might bear on the sentence or inform a recommendation to mercy. For those reasons, early-modern criminal court sittings typically involved a high number of "open and shut" criminal cases heard in rapid succession, each being disposed of within 20 to 30 minutes, largely without any need for the jury to retire for the purposes of deliberation.

The seventeenth-century common law judge was not the "neutral arbiter" or "referee" figure of the modern adversarial system; rather he was something of a "director" of proceedings, and purported to also act as counsel on behalf of the accused, if questions of law arose in the course of the trial.[179] This judge might have morphed into an inquisitorial type, but was not given the chance; instead, more and more control over criminal proceedings was conferred onto the parties, first by Parliament and then by the judiciary. Langbein and Shapiro[180] both point to the Treason Act of 1696,[181] which first codified the right to defence counsel in relation to charges of treason, as an essential hinge point upon which the development of the adversarial trial turns.

Opponents of the Stuart kings Charles II and James II had been targeted and executed through the use of treason trials, and critique of the conduct of those trials was a notable subject of Whig pamphleteers in the years preceding and following the Glorious

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[179] *Ibid* c 1.

[180] Langbein, *supra* note 176; Alexander H Shapiro, "Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696" (1993) 11:2 Law & Hist Rev 215–256.

[181] An Act for Regulating of Trials in Cases of Treason and Misprision of Treason, 7 Wil 3, c 3 (1696). Part of this enactment remains in force today as the Treason Act 1695, so named because the short titles of enactments were dated to the first year of a Parliamentary session, rather than the year they were enacted. Legal writers have tended to nonetheless refer to the Act as the Trials Act or Treason Trials Act 1696, an approach I also follow here for simplicity.

Revolution. Elements of this critique included the shifting ground of "treason" through the emergence of a judicially developed crime of "constructive treason"; the lack of any effective representation of defendants' interests from compliant judges; the imbalance between the King's law officers acting as prosecutors and the unrepresented defendant; and the absence of defence counsel to raise issues of law or inconsistencies in the evidence which an unrepresented defendant might fail to address.[182] Judges in Stuart England were frequently appointed and sacked for political reasons, and viewed themselves as public servants implementing royal policy rather than independent and apolitical arbiters of justice. Treason trials were inevitably political affairs and the concept of "court-as-counsel" therefore "proved to be an unworkable aspiration".[183]

The passage of the Treason Act can be seen as an early manifestation of the link between adversarial criminal procedure and the emergence of liberal democracy. The Whig critique of treason trials was "not easily distinguished from larger concerns of political theory and government."[184] The format of the "altercation" trial reflected a broader political culture of "deference and obedience to the Crown's rights"[185] in which the dispensing of justice by the King's judges was regarded as inviolable. In that context, while defence counsel were in theory permitted to argue issues of law, requests for counsel were seen as both "redundant" and also an affront to the court's "integrity and legitimacy". Outside of the trial process itself, this political culture manifested as opposition to or prohibition of efforts to challenge the legitimacy of treason charges or

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[182] Shapiro, *supra* note 180.

[183] Langbein, *supra* note 176 at 83.

[184] Shapiro, *supra* note 180 at 228.

[185] *Ibid* at 229.

expose witness corruption.[186] But the privileges of the Crown were challenged successfully through the Glorious Revolution by a political grouping which held that royal authority was not divine and absolute, but rather contingent upon the consent of the governed and the defence of their interests. The Treason Act was an early step in the gradual "realignment of political priorities in favour of the citizen" started by the Revolution.[187] Whigs drew a direct line between the idea of freedom of speech[188] and the right to defence counsel, through whom judicial interpretation of the law and the Crown's presentation of the evidence could for the first time be effectively challenged in the course of a treason trial.

Another similar Whig idea which influenced the Treason Act was the natural law theory of "self-preservation": that, faced with death, a defendant was entitled (or even duty-bound) to vigorously defend himself. Shapiro describes this as something of a paradigm-shifting idea, suggesting it "raised basic issues about the interaction of the public and private ends in the legal system that were critical to a reassessment of the goals of trial procedure"[189] which had until then "rested on a theory of civil order that privileged the safety of the Crown and nation over the liberty and safety of the individual."[190]

The developing moral philosophy of the seventeenth and eighteenth centuries reflected the same challenge to traditional justifications for royal authority that can be distilled from Whig political philosophy – that is, "established conceptions of morality as

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[186] *Ibid* at 230.

[187] *Ibid* at 254.

[188] As reflected in the Bill of Rights 1688's expression of Parliamentary privilege: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

[189] Shapiro, *supra* note 180 at 241.

[190] *Ibid* at 235.

obedience" were contested and supplanted by "emerging conceptions of morality as self-government".[191] A universal feature of this new conception of morality as self-government was to assume that "moral agents must possess certain specific psychological capacities":[192] they were "men who were roughly equal in capacity, and capable of productive economic activity".[193] Foucault suggests that "reason" had by this time come to be thought of as an inherent requirement of all legitimate thought, and thus a universal requirement of membership in any human community. Unreason thereby became a cause of alterity – it came to mark one out as an "Other".[194] In such a context, where autonomy-rationality was an emergent value of political philosophy, a cognitively impaired defendant seems unlikely to have been imagined as the likely subject of the new procedural rights codified by the Treason Act. Revolutionary energy was instead directed towards undermining "the basis of monarchical and hierarchical conceptions of politics".[195] The concern of Whig politicians and pamphleteers was the injustice evident in actual treason trials of the late seventeenth century, which tended to involve educated noblemen and clergy.[196]

In contrast, Damaška suggests more abstract drivers behind the emergence of adversarial procedure. Damaška proposes two polarised ideological domains – the function of justice (the "why" of the justice system) and the structure of authority (the "how"). I have already noted Damaška's two polar "functions of justice" above: resolving

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[191] Jerome B Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge, UK: Cambridge University Press, 1998) at 10.

[192] *Ibid* at 9.

[193] Nussbaum, *supra* note 161 at 14.

[194] Michel Foucault, *History of Madness* (London: Routledge, 2006) at 47, 181.

[195] Nussbaum, *supra* note 161 at 32.

[196] Langbein, *supra* note 176 c 2.

conflicts, on the one hand, and implementing policy, on the other. These may not be express ideologies and are unlikely to be perfectly implemented by any state through the criminal justice system, but Damaška does feel able to draw a clear link between conflict resolution, laissez-faire attitudes and adversarial procedure – and, implicitly, the primary importance of autonomy-rationality in "conflict-resolving" systems.[197]

Damaška also suggests that the structure of judicial authority influenced procedure. He proposes two ideal types of judicial authority – *hierarchical* authority, in which there is a state apparatus providing clear lines of authority and accountability between lower and higher courts, seeking principled consistency in accordance with spirit of "logical legalism"; and *co-ordinate* authority, which involves a dispersed, non-professional officialdom which seeks substantive justice in accordance with well accepted norms.[198]

English adversarial procedure emerged when a co-ordinate lay-gentry was largely in control of administering justice. Apart from assize courts hearing felony charges, which were administered by royal judges travelling from London on circuit, most criminal justice was administered at the local level by justices of the peace. These were volunteers, often lacking legal qualifications, drawn exclusively from the wealthiest 3% of the adult male population.[199] Damaška suggests that such co-ordinate judicial authority lends itself to concentrated single instances in which the whole of the conflict is determined – the criminal trial – whereas hierarchical authority is more accommodating of an iterative approach to justice. Further, the lack of a state hierarchy through which an investigation produced a "file" allowing the judge to understand the whole case and drive the

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[197] Damaška, *supra* note 124 c 4.

[198] *Ibid* c 2.

[199] Douglas Hay, "Crime and Justice in Eighteenth- and Nineteenth-Century England" (1980) 2 Crime and Justice 45–84.

proceedings meant that it was the parties who controlled the introduction of evidence at the trial. The judge was relatively uninformed and poorly placed to intervene in proceedings, compared to the judges in continental systems.[200]

An English criminal trial was normally regarded as the sole opportunity to demonstrate guilt or innocence: criminal appeal rights were not a part of common law criminal procedure when the model was transplated into British colonies, whereas many continental systems had incorporated appeals for centuries. Reliance on the file as the main source of evidence in continental systems was more conducive to hierarchical review; in contrast, evidence was largely oral and not reliably recorded in most English criminal proceedings. It wasn't until 1907 that a broad right of appeal was conferred in England.[201] The contours of that trial, and the tactical decisions made about pleading and evidence, would therefore normally be determinative of the outcome of criminal process.

Damaška's approach may have explanatory power as to the emergence of adversarial procedure, but cannot (other than by path dependence) explain why it has endured. The modern administrative state in most common law jurisdictions now tends to exemplify hierarchical rather than co-ordinate authority,[202] complete with modern record-keeping and rights of appeal. Of greater interest is the link between emergent adversarialism and the early Whig groundwork for modern democracy, as well as the Enlightenment ideal of morality as self-governance. As I go on to explain below and in chapter 4, these links remain firm ones.

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[200] Damaška, *supra* note 124 c 6.

[201] Peter D Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22:1 Duke J Comp & Int'l L 1–46.

[202] The obvious exception is those jurisdictions where judicial officers are elected.

3.4 Autonomy-rationality and substantive criminal law

Examining the emergence of autonomy-rationality as core ideas underpinning adversarial criminal procedure risks telling only part of the story of how those ideas shape criminal adjudication. A finding of unfitness to stand trial is a form of exculpation from the criminal process based on lack of the required capacity to participate in that process. But similar reasoning underpins exculpatory doctrines throughout the criminal law – and is not exclusive to the adversarial trial format. Mental capacity doctrines within criminal law help to illustrate this point.

Concern with the incapacitated defendant pre-dates the modern adversarial trial. This can be seen from examination of the long-standing common law procedural necessity of entering a plea to a criminal indictment. A failure to plead prompted investigation of the reasons – whether the defendant was "mute by malice", or by "visitation of God". A malingering defendant was subject to *peine forte et dure* until they either relented by entering a plea or were crushed to death, whereas a defendant mute by "visitation of God" would be merely imprisoned (and sometimes pardoned).[203] Matthew Hale, who served as Lord Chief Justice of the Court of Kings Bench under Charles II, recorded an influential seventeenth-century view of the appropriate procedure to be applied where someone "before his arraignment becomes absolutely mad" – what we would now refer to as unfitness to stand trial. Hale noted that such a defendant "cannot advisedly plead to the indictment" so ought not be tried, but rather imprisoned "until that incapacity be

[203] Don Grubin, "What constitutes fitness to plead?" (1993) Criminal Law Review 748–758.

removed". This procedure was to apply even if the person had apparently committed a capital offence in sound mind and confessed, later becoming incapacitated before trial.[204]

Hale's discussion of trial fitness is nestled among a discussion of the impact of infancy[205] and insanity, upon both trial procedure *and* criminal responsibility.[206] This intermingling reflects a broad moral position as to the proper response to incapacity. At the same time the facets of adversarial trial began to emerge throughout the eighteenth century, criminal law had what Loughnan calls a "fluid mental capacity terrain" which eschewed formalised doctrines.[207] The practice of excusing defendants by reason of infancy or insanity (whether at the time of offending, or "on arraignment") emerged from the same moral position: that "the capacity to distinguish between right and wrong was an element of criminal responsibility."[208] Jennifer Radden[209] argues that the medicalisation of unreason into "madness" (as charted by Foucault[210]) has led to confusion as to the theoretical basis for exculpating mentally ill criminal defendants – it is not madness or any particular mental illness, but rather the folk concept of *unreason*, present in both children and "insane" adults, which is recognised as exculpatory.[211]

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[204] Sir Matthew Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown*, Sollom Emlyn, ed (London, 1736) at 34–6. Hale's manuscript was not published until 1736, but was written in the mid-1600s.

[205] *Ibid* at 16ff.

[206] *Ibid* at 29ff.

[207] Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012) at 75.

[208] *R v JTB* [2009] UKHL 20, at [15].

[209] Jennifer Radden, *Madness and Reason* (London: George Allen & Unwin, 1985).

[210] Foucault, *supra* note 194.

[211] Radden, *supra* note 209 c 4.

The infancy doctrine emerging from this period largely survives to the present day. Under the doctrine of *doli incapax*, there was an irrebuttable presumption that a child under the age of 10 was not criminally responsible – such a child was conclusively held to lack the ability to distinguish between "good and evil".[212] A rebuttable presumption applied to children aged 10-14, where they were taken to lack this capacity unless the contrary was proven. The same formulation – the "good and evil" test – was applied to people apparently labouring under a sufficiently clear form of insanity, whenever that insanity might have arisen.[213] Over time, insanity doctrines were formalised along two divergent paths – the fitness to stand trial test, which provides a temporary excuse from criminal procedure; and the insanity defence, which provides conclusive exculpation from criminal responsibility. While the fitness to stand trial test is focused on the specific capacities needed to participate in criminal proceedings, the insanity defence has tended to retain its moral evaluative nature and focus on the capacity to distinguish between right and wrong.[214]

Other exculpatory doctrines in criminal law also proceed from the deep core assumption of autonomy-rationality – that the usual subject of criminal law is an autonomous individual with the capacity for self-governance and moral reasoning. The "voluntary act" requirement for criminal guilt[215] and the associated defence of automatism illustrate

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[212] The origins of this test are explored by Anthony Platt & Bernard L Diamond, "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey" (1966) 54:3 Cali LR 1227–1260.

[213] Loughnan, *supra* note 207 at 70–4.

[214] See for example the Canadian Criminal Code (RSC 1985, c C-46) s 16(1), and the Crimes Act 1961 (NZ) s 23(2).

[215] The Canadian Supreme Court has expressed this concept as a facet of "fundamental justice", protected by s 7 of the Charter of Rights and Freedoms: "only voluntary conduct – behaviour that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability": *R v Ruzic* [2001] 1 SCR 687.

this. An externally imposed total loss of voluntary control over one's actions, through no fault of one's own, means that the defendant is blameless and ought not be punished for their wrongdoing.[216]

Despite the process of formalisation, which has seen procedural and substantive doctrines ossify in different ways, the "fluid mental capacity terrain" Loughnan identifies continues to organise reformist projects. Governmental law reform commissions typically still consider mental capacity to stand trial and the insanity defence as two elements of the same issue of "mentally impaired defendants".[217] The England and Wales Law Commission recently noted that "the foundation of criminal responsibility is the person's capacity not to do the act which would amount to an offence."[218]

Moreover, legal philosophers have widely posited that a criminal punishment cannot be regarded as *just* if the defendant lacked the capacity to avoid the offending. Peter Cane describes the requirement of culpability or blameworthiness as the foundation of moral responsibility as a "clear and persistent" theme in the philosophy of responsibility.[219] HLA Hart also gives a capacity-based rationale for "guilt" being a crucial element of just punishment: "those whom we punish should have had, when they acted, the normal

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[216] Loughnan, *supra* note 207 at 122–33.

[217] See for example *Mental impairment decision-making and the insanity defence*, by Law Commission, Te Aka Matua o te Ture, R120 (Wellington, New Zealand: Law Commission | Te Aka Matua o te Ture, 2010); *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: report*, by Victorian Law Reform Commission (Melbourne: Victorian Law Reform Commission, 2014). The England and Wales Law Commission implicitly affirmed the legitimacy of the insanity defence when while reviewing special criminal procedure, as it proposed a power to make special verdicts on the basis of insanity for defendants found unfit to stand trial: Law Commission, *supra* note 22. Further to Loughnan's claim of a "fluid mental capacity terrain", insanity and automatism raise sufficiently similar issues that they were earlier considered together by the same Law Commission: *Criminal Liability: Insanity and Automatism, A Discussion Paper*, by Law Commission (London: HM Stationary Office, 2013).

[218] Law Commission, *supra* note 217 at para 2.1; see also Victorian Law Reform Commission, *supra* note 217 at para 4.6.

[219] Peter Cane, *Responsibility in Law and Morality*, Volkmar Gessner, ed (London: Bloomsbury, 2003) , s 3.6.1.

capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities."[220]

The centrality of mental capacity to criminal responsibility[221] and just punishment is not merely a requirement of law or of a particular legal system. Antony Duff offers a normative description of responsibility, suggesting a person is "responsible" when they are "capable of responding appropriately to relevant reasons" which bear on their situation. A responsible agent is not a purely rational being, but must be capable of rationality such that their "emotions and desires…as well as beliefs" are capable of being guided by reason.[222] George Fletcher, attempting a comparative analytic synthesis for the purpose of informing the growing field of international criminal law, proposes certain universal features of national criminal law systems: punishment, human action, guilt and wrongdoing. Fletcher suggests these ideas stand in relation to each other as follows: punishment is a "sanction imposed for a violation of 'important' legal norms" through human actions which cannot be justified – in other words, an instance of "wrongdoing". The fact that punishment is enforced by the state suggests that punishment is an expression of a political theory of justice. A "just" punishment requires "guilt", which (depending on the way that an offence is constructed) requires either actual intention or knowledge, or at the very least a capacity for a wrongdoer to take responsibility or

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[220] H L A Hart, *Punishment and responsibility: essays in the philosophy of law*, 2nd ed (Oxford: Oxford University Press, 2008) at 152.

[221] I am only concerned here with illustrating the strong link between mental capacity and criminal responsibility but, as Lacey explores, justifications for criminal responsibility also draw on ideas about the offenders' character, the outcomes of their actions, and the risk they may pose in future: Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford: Oxford University Press, 2016).

[222] R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (London: Bloomsbury, 2009) at 39.

accountability. Punishment for wrongdoing without guilt is comprehensible, but unjust.[223]

3.5 Universal legal capacity – a normative claim lacking cognitive appeal

Martin Carstensen suggests that "what makes a paradigm coherent is whether policy actors conceive them as coherent – whether they can forcefully make an argument for its problem-solving abilities – and the historically founded embeddedness of the paradigm in the culture of the polity, that is, its resonance with established values".[224] I suggest the idea of autonomy-rationality is a *zeitgeist* idea which broadly informs adversarial criminal justice systems, both procedurally and substantively. It lends those systems coherence by informing both procedural fairness and substantive concepts of responsibility and exculpation. By contrast, universal legal capacity has a strong normative appeal, but currently lacks an equivalent coherence.

Rebutting the "personhood" concerns of Convention advocates feels inherently repulsive, because doing so tends to suggest that admission to personhood (both moral and legal and, implicitly, to *humanity* itself) depends on cognitive function. This speaks to the overwhelming normative strength of discourses affirming the inherent value of all human life.

But *legal* personhood is not conferred in such a way that it is coterminous with moral personhood or humanity – it is not an "intrinsic attribute" of a human being, but rather a status that a legal system confers on a human (or another entity).[225] An "all-or-nothing"

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[223] Fletcher, *supra* note 119 cs 6–8.

[224] Carstensen, *supra* note 109 at 299–300.

[225] Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford: Oxford University Press, 2019) at 92.

approach to legal personhood – where one is either a holder of rights and duties or not – does not reflect the complex realities of legal personhood as it is actually practiced. Whether a natural person is treated as a full legal person, in that they have both standing to be the subject of rights (what Kurki calls the *passive* incidents of legal personhood)[226] and the agency to enforce them and to accept civil and criminal legal responsibility (the *active* incidents), is highly context-dependent. Different legal regimes may treat only citizens, adults, or incorporated groups as subjects of the rights or duties conferred by that particular regime. And while the capacity for reason is a condition of responsible subjecthood in criminal law which manifests in opportunities for both age- and "insanity"-based exculpation, exclusion from criminal responsibility on such grounds does not mean the exculpated criminal defendant is non-human or lacks moral personhood. Instead, the defendant may (for example) have not yet reached the age where a capacity for moral reasoning is assumed, or have been experiencing a temporary psychosis at the time of offending. Incapacity is in both cases contextual and temporary.

As Naffine notes, religious or moral concepts of human sanctity are often deployed to inform "personhood" in the domain of medical decision-making, whereas rationalist accounts often predominate when defining the subjects of criminal law.[227] This asymmetry reflects Kurki's active/passive divide in legal personhood, between protection from harm and responsibility for perpetrating harm. *Passive* legal personhood is already a near-universal value in criminal law: a harmful act prohibited by a criminal

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[226] *Ibid* at 95. Kurki proposes a compelling "Bundle theory" of personhood, made up of passive and active incidents. All who enjoy the substantive passive incidents of legal personhood (fundamental rights; the capacity to own property; an "insusceptibility to being owned"; standing to enforce rights; and the capacity to undergo civil and criminal harms) are "passive" legal persons. Full legal persons also share the "active" incidents of legal personhood (capacity to freely administer the passive incidents of personhood; responsibility in criminal and civil law).

[227] Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Hart Publishing, 2009) at 6–7.

offence does not require a victim who meets a concept of legal personhood qualified by rationality or any other qualification (besides being born alive);[228] rather, the law benefits any human. Universal legal capacity, taken to its logical end in criminal law, seeks only to modify incidents of *active* personhood such as procedural participation and responsibility practices.[229]

It is difficult – perhaps "irresponsible"[230] – to divorce conceptions of legal personhood from the context in which that legal domain operates. Quinn and Rekas-Rosalbo correctly diagnose the disjunct between the Committee and state parties' understanding of legal personhood – that states need to somehow be "persuaded to move away from cognition as the essence of personhood."[231] But they also acknowledge that different legal domains admit humans and non-humans as "persons" by reference to broader policy reasons.[232]

The wrongs defined by criminal law suggest why a conception of active legal personhood based on autonomy-rationality might be apt to the domain of criminal law, but less apt in the domain of personal decision-making. Prohibition of the harms inherent in much serious violent criminality predates modernity or codification – rather, it was shaped by majoritarian notions of the requirements of peaceful and orderly community life, with breaches of those requirements seen as "manifestly" criminal.[233] This deeply entrenched basis by which communities recognise the acts constituting the "wrongs" of criminal law

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[228] See eg *Attorney-General's Reference No 3 of 1994* [1998] AC 245.

[229] Minkowitz, *supra* note 36.

[230] Naffine, *supra* note 227 at 32.

[231] Gerard Quinn & Abigail Rekas-Rosalbo, "Civil death: Rethinking the foundations of legal personhood for persons with a disability" (2016) 56 Irish Jurist 286–325 at 304.

[232] *Ibid* at 325.

[233] George P Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000).

therefore reflects widely held normative conceptions of the good life, which implies a criminal law which privileges certain subjectivities over others, and which punishes refusal to comply with community expectations (or excuses inability to comply). A community with a basic set of shared values is thus a necessary component of criminal responsibility.[234] Disability and foreignness are two aspects of alterity used to define the "borders" of a community[235] which "imagines and sustains itself through the construction and consequent exclusion" of those "others".[236] These features seem likely to be fiercely difficult to dislodge – it is hard to conceive of a criminal law that does not treat some subjectivities as more valid than others, whether chosen by sampling the attitudes of the community for whom the law applies, or through a systematic rationalist or moral process. A rationalist approach to criminality has in some jurisdictions helped to reclassify self-harm offences – the "crimes" of suicide and euthanasia – as fundamentally personal and private concerns, but there is no comparable prospect of revisiting whether interpersonal violence ought to be criminalised. Minkowitz's suggestion that criminal law does not *need* to "valorise reason or rationality as a supreme human function"[237] may therefore prove difficult to accept.

A unitary view of legal and moral personhood and humanity also ignores another legal domain of importance – the voluntary relinquishing of decision-making by elderly people. This is currently sanctioned by law in many jurisdictions under tools such as powers of attorney, under which people grant the power to exercise legal agency over

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[234] Duff, *supra* note 222 at 44.

[235] Hudson, *supra* note 97.

[236] James Berger, *The Disarticulate: Language, Disability, and the Narratives of Modernity* (New York: New York University Press, 2014) at 143.

[237] Minkowitz, *supra* note 36 at 437.

domains such as personal property and healthcare to a different person. The rising prevalence of dementia among aging populations means such arrangements are often used by people concerned about their ability to continue making sound decisions as they age. If active legal personhood is indelibly linked to *humanity*, there ought to be something very wrong about assigning it be exercised according to the judgment of another person. The degree of control this confers suggests a similar moral repugnancy to slavery. But this isn't seen as repugnant – it is seen as routine.[238]

Jillian Craigie challenges the "singular understanding" of decision-making capacity and criminal responsibility as two parts of the same issue of "legal capacity", arguing that moral and political considerations inform different parts of the law in different ways and "this is likely to justify asymmetries" across those two domains.[239] She considers the "personhood" argument made by Convention advocates (that is, the equating of legal personhood with humanity) favours an equal approach to both domains, because withholding criminal responsibility on the basis of incapacity involves "social exclusion" and "partial withdrawal" of recognition in the same way withholding personal decision-making capacity does. Craigie is however sceptical of symmetrical application of the "personal growth and flourishing" argument – the idea that being permitted to make decisions will positively benefit the development of cognitively impaired people – on the basis that there is real promise for *personal* decision-making to permit real opportunities for growth and flourishing, but it is doubtful the criminal justice system can achieve the

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[238] Elderly people with dementia may be the largest group affected by an art 12-inspired concept of universal legal capacity in industrialised countries, but their interests were not well represented in Convention negotiations: Series & Nilsson, *supra* note 7 at 343.

[239] Jillian Craigie, "Against a singular understanding of legal capacity: Criminal responsibility and the Convention on the Rights of Persons with Disabilities" (2015) 40 International Journal of Law and Psychiatry (Mental Capacities and Legal Responsibilities) 6–14 at 6.

same. And the "limited understanding" argument – the idea that cognition is poorly understood by science, so ought therefore be presumed – is counterbalanced by broader considerations of punishment and accountability in the criminal sphere, which do not hold as much sway in the simpler, more private context of personal decision-making where values of liberty and well-being are more influential.

The identification of a number of evaluative arguments made in favour of universal legal capacity, and the downplaying or side-stepping of psychological or scientific arguments on the basis that measuring cognition is inherently doubtful, leads Craigie to identify a fundamental weakness of universal legal capacity discourse: "virtually any degree of asymmetry between standards for legal capacity" can be justified, "so long as the difference is justified in moral or political terms."[240] This is a powerful insight which helps to explain why the coherence of mental capacity issues across various domains is so frequently ignored by advocates of universal legal capacity: the asymmetrical treatment of conceptually similar legal problems is justified solely on a moral or political basis. In this case, an argument based in "human rights" applying to the strategic grouping of "persons with disabilities", which suggests rights-holders have absolute and inviolable interests, can be deployed as something of a normative "trump". Other exemptions from criminal responsibility which are not related to "disability" such as youth; age-related degeneration and carve-outs from active legal personhood such as enduring powers of attorney; or approaches to other similar issues of legal reliance such

[240] *Ibid* at 11.

as the presumptions underlying capacity to enter contracts: all inconsistency can simply be justified at another time by reference to different moral or political considerations.[241]

The supposed close and illimitable link between humanity and full legal personhood posed by the new idea of universal legal capacity is then, in many ways, incoherent when applied to criminal law. A focus on functional decision-making ability alone – the unfit to stand trial test – fails to reckon with the way that the requirement of a capacity for reason has been integrated with (and is perhaps even *generative* of) the substantive criminal law. This marks out criminal law as a legal domain in which a restrictive understanding of active personhood is understandable, compared with fundamentally personal decision-making about health and welfare in which a shift towards a "support" paradigm may be easier to advance.

Recalling the two qualities of persuasive ideas discussed in chapter 2, it is clear enough that the idea of universal legal capacity is normatively appealing, because the arguments mustered in favour implicate the very humanity of disabled people. But there are contrasting ideas of active personhood in the criminal domain, which encompass a duty to act in accordance with normative expectations. Lacking the capacity to do so drives exculpatory criminal law doctrines such as the "capacity for reason" requirement which sees children excluded from criminal law as well as disabled adults, and the "voluntary

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[241] This dynamic is again neatly captured in Arstein-Kerslake's work, which sidesteps the issue of incapacity in children altogether in reliance on competing normative arguments sourced in the Convention on the Rights of the Child: Arstein-Kerslake, *supra* note 58 at 40 and fn 6; see also Minokwitz's dismissal as "nonsense" Slobogin's attempt to devise a coherent scheme for preventive detention of "undeterrable" offenders on the basis that disabled people would be captured by such a scheme, and this would be morally unacceptable: Minkowitz, *supra* note 36; and tentative negotiations towards a further UN convention on older persons' rights as the way of resolving issues about legal capacity and ageing, detailed by Eilionóir Flynn, "Disability and ageing: Bridging the divide? Social constructions and human rights" in Peter Blanck & Eilionóir Flynn, eds, *Routledge Handbook of Disability Law and Human Rights*, 1st ed (London: Routledge, 2016) 195.

act" requirement which underpins the defence of automatism, both of which reflect a deep assumption of autonomy-rationality as a basic criterion for subjecthood in criminal law. The relative unity that these doctrines demonstrate has a systemic, *cognitive* appeal, which is not currently replicated by universal legal capacity discourse.

The Convention does not purport to define "disability". That term is best understood through the breadth of the strategic political coalition which makes use of it. This encompasses people with physical and cognitive impairments, as well as those people who prefer to conceive of "mental illness" as "psychosocial disability". There is no room for dispute that people with cognitive impairments and mental illnesses are at greater risk of being affected by the mental capacity doctrines entrenched in various ways across legal systems, but that is not all those doctrines do. The social model of disability pursues a cross-cutting inclusivity, but Convention critiques (with their focus on disabling societal structures) have yet to deal well with the prior (and universal) human phenomenon of *dependency*, which is both inevitable and to a certain extent biologically-determined.[242] The inescapable realities of childhood and old-age dependency, and the ever-present prospect of temporary incapacitation, also lends systematic cognitive appeal to those legal doctrines which account for these fluctuations of human capacities.

The deployment of moral and political arguments in favour of universal legal capacity for disabled adults, while minimising scientific or psychological arguments about mental capacity and refusing to justify asymmetry with other criminal law doctrines assuming autonomy-rationality, fails to marry ethical concerns with social realities. The result is

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[242] Eva Feder Kittay, *Love's Labor : Essays on Women, Equality and Dependency*, 2d ed (New York: Routledge, 2020) at 34; Eva Feder Kittay, "Dependency" in Rachel Adams, Benjamin Reiss & David Serlin, eds, *Keywords for Disability Studies* (New York: New York University Press, 2015) 54.

that, in the criminal sphere, the claim for universal legal capacity often amounts to little more than an applied slogan (i.e., "disabled people are people") shorn of working or extrapolation.[243]

3.6 Conclusion

Advocates of universal legal capacity seek to disrupt the hitherto linked ideas of autonomy and rationality. These concepts are deeply entrenched in criminal law, at the level of "zeitgeist". Arguments in favour of implementing universal legal capacity in criminal law are normatively attractive, but tend to lack cognitive appeal because they fail to coherently account for the range of legal doctrines which proceed from these deep assumptions.

Having established that advocates of universal legal capacity face serious challenges, in Chapter 4 I assess the relative strengths and weaknesses of three models of change which would achieve a universally accessible system of criminal procedure.

[243] Articles 12(1)-(2) are hardly more developed than this slogan, asserting simply that disabled people "have the right to recognition everywhere as persons before the law" and "enjoy legal capacity on an equal basis with others in all aspects of life."

Chapter 4: Models of change to adversarial criminal procedure

Thus far I have endeavoured to establish that autonomy-rationality is a fundamental value in criminal law, widely accepted as a requirement of criminal responsibility and just punishment and central to the emergence of adversarial criminal procedure. Universal legal capacity, which proposes supported autonomy within legal systems without regard to decision-making capacity, is a largely normative claim grounded in human rights concerns. This leads advocates of universal legal capacity to pitch the claim in absolute terms without exploring nuances or implications for criminal law in sufficient depth, resulting in a discourse which often lacks cognitive appeal.

The cognitive weakness of contemporary universal legal capacity arguments does not mean that such claims will simply disappear. The Convention and the Committee will continue to exist and, barring amendment to art 12,[244] the implementation of universal legal capacity will continue to be sought by the Committee and other Convention advocates. Recalling Wood's proposition that communicative discourses of (de)politicisation are a strong driver (or inhibitor) of third-order change, the deployment of universal legal capacity arguments ought to be viewed as a politicising discourse which will likely continue to give rise to agitation for third-order change within legal systems. Although nothing is ready to be planted, the soil is continuously tilled.

In this final chapter, I first establish the need for third-order change to adversarial criminal procedure to realise the promise of universal legal capacity. I then begin to assess three models by which third-order change might be achieved in sections 4.2 and

[244] As suggested by Paul S Appelbaum, "Saving the UN Convention on the Rights of Persons with Disabilities – from itself" (2019) 18:1 World Psychiatry 1–2.

4.3, noting that the model most favourable to the goals of Convention advocates is also the one which requires the most difficult ideological reconsolidation – the disaggregation of autonomy-rationality described in chapter 3. Finally, in section 4.4 I note where opportunities exist to improve the prospects of institutional change.

4.1 Is a "paradigm shift" actually required?

I suggest adversarial criminal procedure cannot fully absorb the new idea of universal legal capacity without third-order change – a paradigm shift. To return to Peter Hall's terminology of change in policy paradigms, first- and second-order change to adversarial criminal procedure – or "normal policymaking" – cannot achieve a universally accessible criminal procedure. Third-order change of some kind is necessary.

The England and Wales Law Commission has engaged with the challenge that art 12 of the Convention poses to adversarial criminal procedure in its report *Unfitness to plead* which recommends substantial reforms of special criminal procedure. The report is a comprehensive example of policy actors "puzzling" within the paradigm of adversarial criminal procedure, in order to respond so far as is possible to art 12 through first- and second-order policy change. Between 2008 and 2016 the Commission and interested policy actors engaged in an iterative co-ordinative discourse, with input from academics (including disability academics), public servants, judges, legal practitioners, mental health clinicians, and civil society organisations representing disabled people and victims of crime, via a consultation paper published in 2010, an issues paper in 2014, a

multidisciplinary symposium and other research and meetings conducted by the Commission.[245]

The Law Commission correctly notes that the Convention requires state parties to minimise the diversion of disabled people from mainstream institutions and provide special adaptations or support to ensure their inclusion.[246] But the Commission equivocates as to whether art 12 requires state parties to implement systems which reflect the idea of universal legal capacity, noting that there was no definitive interpretation of the Convention's impact on special criminal procedures.[247] Evidently, from the Law Commission's conclusion as to Convention compliance, a "paradigm shift" was seen as being out of scope for the *Unfitness to plead* project:[248]

> *The ramifications of the UNCRPD for a number of areas of criminal law have yet to be fully analysed and assimilated by government and policy-makers. Giving full effect to some of the principles of the UNCRPD would require much more fundamental change to the criminal justice system than is likely to be achievable at this time, or within the scope of this project.*

First-order change can vastly improve accessibility to adversarial criminal procedure. As I have already discussed in chapter 1, the criminal process is often modified so that people like Nussbaum's Case A and Case B can be accommodated without abandoning the fundamentals of adversarial trial. Such measures might include permitting more time

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[245] Law Commission, *supra* note 22 c 1. The result of this process was a final report and draft legislation, published in 2016; as of yet, no legislative process has occurred and no final government response to the Commission's proposals has been tabled in Parliament.

[246] *Ibid* at para 3.168.

[247] *Ibid* at para 3.170.

[248] *Ibid* at 3.176.

to consider and make decisions, and shortening court sessions or adding additional breaks to avoid overloading defendants with information. Communication assistance can also be used to translate complex concepts into digestible ones, and help a defendant express their decisions.

Other than court resourcing and judicial flexibility as to the first-order accommodations necessary in individual cases, more structural second-order change might also improve accessibility to the adversarial criminal trial. As the Law Commission notes, statutory change might ensure better access to intermediaries, and universal training for the judiciary could better safeguard disabled defendants' interests.[249] Defendants' autonomy might also be better respected, and criminal procedure made more accessible, if fitness to plead guilty were disaggregated from fitness to stand trial, on the basis that a defendant found unfit to stand trial may nonetheless have the capacity to take the simpler decision of pleading guilty.[250] Nothing in these proposed second-order changes would detract from the fundamentals of adversarial criminal procedure.

As well as changing adversarial criminal procedure, it may also be possible to conduct special criminal procedure "as nearly as possible as if it were a criminal trial".[251] Such alterations would not create a single universally accessible procedure, but would tend to minimise differences in procedure between those fit to stand trial and those found unfit. At present, some instances of special criminal procedure involve proof of only the "act or

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[249] *Ibid* at para 2.30, 2.67. A successful example of judicial training is the "Disability Bench Book", a resource developed for judges in Victoria, discussed by Piers Gooding et al, "Supporting accused persons with cognitive disabilities to participate in criminal proceedings in Australia: Avoiding the pitfalls of unfitness to stand trial laws" (2017) 35:2 Law in Context 64–84.

[250] Law Commission, *supra* note 22 at para 3.138-3.157.

[251] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 16(1).

omission" at issue;[252] others require a hearing into fitness to stand trial, but no equivalent of the fact-finding criminal trial at all.[253] It is clear then that, short of a paradigm shift, there is room for Convention compliance concerns to drive substantial improvements to adversarial criminal procedure.

While applying the usual standard of proof, rules of evidence, and defences in special criminal procedure might result a higher number of acquittals, a reformed procedure cannot produce a "conviction" or result in a "punishment", and so such procedures continue to raise the spectre of long-term preventive detention for people found guilty in special criminal procedures or who successfully rely on a partial defence like insanity.[254] Special criminal procedures are therefore an improvement, but do not completely address the challenge of universal legal capacity.[255]

4.2 Three models of third-order change

In light of the conclusion that third-order "paradigm" change is necessary, I assess three different models of third-order change to adversarial criminal procedure. Those models are, in short: the excision of special criminal procedure from adversarial systems (**model 1**); change to a new system informed by inquisitorial "ideal-type" procedure (**model 2**); and change towards therapeutic criminal procedure (**model 3**). Models 1 and 2 reflect already-existing paradigms of adversarial and criminal procedure, respectively,

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[252] *R v Antoine* [2001] 1 AC 340, [2000] 2 WLR 703; Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ), s 10(2).

[253] See for example the Canadian Criminal Code (RSC 1985, c C-46) ss 672.26-672.33, which permits a custodial disposition for defendants found unfit to stand trial so long as the prosecutor be able to prove a *prima facie* criminal case.

[254] Law Commission, *supra* note 22 c 5.

[255] A similar conclusion is reached by Peay, *supra* note 43 at 33.

whereas model 3 draws on proposals for a utilitarian approach to criminal justice, with a preventive rather than punitive focus.

I propose these three models because they each ensure legal capacity "on an equal basis with others" in the criminal procedural domain in terms of art 12 – that is, they are *universally accessible*. Universal (supported) accessibility helps to ensure equal treatment. But, as I come to discuss below, these models do not all necessarily facilitate accessibility via affirmation of the subjecthood of disabled defendants. Only model 1 achieves that goal – a goal which appears central to the project of universal legal capacity advocates.

Model 1: eliminating special procedures within adversarial systems

Model 1 would require disaggregation of autonomy-rationality within adversarial criminal procedure. The result would not be *identical* treatment of cognitively disabled defendants – in many cases, doing so would breach the art 12(3) duty of accommodation and support, and risk breaching the state's art 12(4) duty to safeguard disabled people from abuse in the exercise of their legal capacity. Instead, having eliminated findings of unfitness to stand trial, and resulting special criminal procedures, states would be obliged to provide all of the supportive measures or accommodations necessary to support cognitively disabled defendants to navigate criminal proceedings. This would be achieved through the sorts of first- and second-order changes to adversarial criminal procedure detailed above.

This begs the question – if the first- and second-order policy solutions required to comply with art 12(3) and (4) are the primary mechanism for implementing model 1, and the procedural machinery of adversarialism otherwise remains, then what makes model 1 an example of "third-order" change? In my assessment, model 1 involves third-order change

because it requires adoption of a *new philosophy of legitimacy*. As noted in chapter 3, the legitimacy of criminal procedure relies on its capacity to fairly uncover the truth. If people are permitted to participate in adversarial criminal procedure despite lacking the capability to do so effectively, legitimacy can no longer be derived from fairness (as we currently understand it) and truth-seeking alone. Rather, legitimacy must, at least in part, rely on the supported exercise of autonomy by a defendant, whatever its consequences. This new philosophy of legitimacy might best be explained as a critical disability approach to procedural "fairness", by marking the exercise of autonomy with or without mental capacity as a hallmark of "fair" procedure.

Model 2: from adversarial to inquisitorial procedure

Advocates of universal legal capacity have signalled that insufficient work has been done to define a universally accessible criminal procedure. Some suggest there may be promise in inquisitorial systems, but have not articulated how these systems might inform change to adversarial criminal procedure.[256] Model 2 draws on these suggestions, in light of the ideal-type of inquisitorial procedure already defined in chapter 3.

Model 3: therapeutic criminal procedure

A further opportunity to implement universally accessible criminal procedure might be under the cover of a different project of reform, such as the long-sought development of a "therapeutic" model of criminal justice.[257] Such an approach seeks to reorient criminal

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[256] Piers Gooding et al, "Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change" (2016) 40:3 Melb U L Rev 816–866 at 862; Arstein-Kerslake et al, *supra* note 39 at 417.

[257] See for example Karl Menninger, "Therapy, Not Punishment" in Jeffrie G Murphy, ed, *Punishment and rehabilitation* (Belmont, CA: Wadsworth, 1985) 172; Barbara Wootton, *Crime and the criminal law: reflections of a magistrate and social scientist*, 2nd ed (London: Stevens & Sons, 1981). Long before, Plato's proposed penal code for the ideal city of Magnesia also sought to reformulate criminal punishment with a strictly

procedure away from a focus on personalised criminal responsibility, and instead steer offenders towards therapy and prevention. A preventive approach to criminality has long provided justification for compulsory mental health treatment where someone is regarded as posing a risk of harm to others, but other more recent developments also have therapeutic and preventive elements. Two of these strains include the growing problem-solving courts movement, which diverts low-level repeat offenders into treatment programmes addressing drug use, domestic violence or mental health difficulties; and the use of non-criminal injunctions which can be collectively termed "behaviour orders", which pre-emptively manage the risk of such diverse harms as terrorism, football hooliganism, and being a bad landlord.[258]

As a "trial" procedure, therapeutic criminal procedure could take many forms but broadly would reflect Barbara Wootton's view that "mens rea has…got into the wrong place" and the primary function of criminal courts ought to be establishing physical responsibility for wrongful acts, coupled with the prevention of future wrongful acts.[259] Christopher Slobogin suggests a pure therapeutic model would be "triggered by an antisocial act [which] pays no attention to desert, or even to general deterrence…the sole goal of the system…is individual prevention through assessments of dangerousness and the provision of treatment designed to reduce it."[260]

It is difficult to describe therapeutic criminal procedure in terms of the "ideal-type" adversarial/inquisitorial procedural systems – not because it would depart from an

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utilitarian view of what would be necessary to cultivate future virtue: Trevor J Saunders, *Plato's penal code: tradition, controversy, and reform in Greek penology* (Oxford: Clarendon, 1994) c 5.

[258] Rory Kelly, *Behaviour orders: preventive and/or punitive measures?* (Doctoral thesis, University of Oxford, 2019) [unpublished] at 8–9.

[259] Wootton, *supra* note 257 at 47.

[260] Christopher Slobogin, "The Civilization of the Criminal Law" (2005) 58:1 Vand L Rev 121–170 at 127.

"adversarial" procedural paradigm, but rather because it departs from the broader *criminal* paradigm. Criminal procedure exists to support the application of a substantive criminal law, which is classically defined as an act "prohibited with penal consequences".[261] Imprisonment or fine are classic examples of criminal punishment, but other sorts of preventive orders, such as registration as a sex offender, or post-sentence supervision orders, can also be regarded as punishments if they are sufficiently linked to a conviction and have a penal purpose or impact.[262] Exposure to risk of punishment drives common law courts to adopt additional procedural protections not present in civil proceedings, such as heightened standards of proof[263] and the fitness to stand trial test. As such the "third-order change" pursued under model 3 is to shift the substantive purpose of criminal law from punishment to prevention.

The reason therapeutic criminal procedure could facilitate universal accessibility becomes clear when we contrast adversarial criminal proceedings with preventive measures which rely not on individualised guilt in relation to a proven prior act, but rather a status which gives rise to future risk, such as compulsory mental health treatment based on a mental disorder giving rise to an assessed risk of harming others. In contrast to adversarial criminal procedure, which gives defendants a heightened autonomous role in light of the potential punitive consequences of a criminal conviction, proceedings in which only preventive orders can result are typically conducted in a more inquisitorial manner which does not require a respondent's active participation to ensure

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[261] *Proprietary Articles Trade Association v Attorney General for Canada* [1931] AC 310, at 324 per Lord Atkin.

[262] *D v Police* [2021] NZSC 2, (2021) 29 CRNZ 552; *Chisnall v Attorney-General* [2021] NZCA 616.

[263] A "criminal" standard of proof (beyond reasonable doubt) might be imposed even if a preventive measure is regarded as civil in nature, if the subject-matter of the order is particularly serious: *R v Crown Court at Manchester, ex parte McCann* [2002] UKHL 39, at para 37 per Lord Steyn.

(procedural) fairness. Model proceedings under mental health regimes[264] encapsulate a therapeutic procedural model:

1. First, an inquisitorial investigation phase involves assessment of the person's circumstances and therapeutic needs. This will normally be prompted by concerning behaviour, and facilitated through detention, interviews, and discussions with other people in a social network such as family members and friends.
2. Second, the investigation phase prompts an assessment as to whether a preventive order directed at reducing future risk is necessary. If so, an application is lodged.
3. Third, an inquisitorial hearing is conducted, which may be led by an interdisciplinary court, which questions the applicant and other people involved in assessment (such as psychiatrists and nursing staff), questions the respondent, and permits the respondent or their lawyer to ask questions and make submissions as to the appropriateness of any order or the conditions of that order.

Adapting this procedure to be fit for all criminal purposes would involve significant change to both procedural and substantive criminal law. Fully elaborating a therapeutic criminal justice system is a formidable task well beyond the scope of this work,[265] but some obvious challenges can be noted. One is how to define crimes which do not rely on a manifestly wrongful physical act, such as non-violent but non-consensual sex. Another is the relevance of "culpability" factors to the appropriate future-focused preventive disposition in the absence of a punishment orientation, including intention and

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[264] The following outline of a model mental health proceeding is based on that provided by the Mental Health (Compulsory Assessment and Treatment) Act 1992 (NZ).

[265] Slobogin, *supra* note 260, proposes the outlines of a preventive criminal justice system in greater detail.

traditional mens rea-negating excuses such as insanity or duress. There must be a robust fact-finding process at the hearing to establish physical responsibility for the unlawful act in question, and a "remedies" phase which abandons "penal" consequences in favour of forward-looking "preventive" ones. The resulting therapeutic procedure is likely to resemble model 2 in terms of inquisitorial investigation and trial procedure, but a substantive lack of penal purposes distinguishes it from ideal-type inquisitorial procedure.[266]

4.3 Barriers to third-order change

Each of the three models outlined above has the potential to implement a fully accessible criminal procedure. Only model 1 achieves both inclusion *and* participation in the criminal justice process, whereas model 2 and model 3 would diminish defendant autonomy in favour of inclusivity. But each of the models has challenges, as I outline next.

Model 1

Model 1 appears likely to have the greatest appeal to Convention advocates, as assuring universal access to adversarial procedure is the approach most consistent with affirming defendant subjecthood. But as will already be clear from chapter 3, while there are relatively low practical barriers to implementing universal legal capacity through

[266] One model which bears investigation for therapeutic adaptation is the "tripartite" model of criminal offence in German law, as explained by Fletcher, *supra* note 119, and; Markus Dirk Dubber, "Theories of Crime and Punishment in German Criminal Law" (2005) 53:3 The American Journal of Comparative Law 679–707. Contrary to the typical common law conception of criminal offences as consisting of actus reus and mens rea, German law assesses criminality by asking (1) whether the statutory elements of an offence were met (an "unlawful" act), (2) whether the conduct was "wrongful" (or in common law terms, "justified" for example through necessity or self-defence), and (3) whether the accused is "culpable". Removing the third stage of this inquiry, and instead directing attention towards whether preventive measures are necessary, would satisfy the conditions of a "therapeutic" criminal procedure.

model 1 (the need for legislative reform), the ideological barriers appear immense: the disaggregation of autonomy and rationality, and the associated need to source criminal procedural legitimacy in the exercise of supported autonomy, whatever its consequences. Universal legal capacity promotes an idea which is incommensurable with current understandings of autonomy, criminality and responsibility, and thus it is difficult to see how this idea can be absorbed into adversarial procedure without the emergence of a critical juncture to create conditions for such fundamental change.

In light of the high level of abstraction inherent in the change demanded by model 1, it is difficult to define its antecedents or predict its consequences. One antecedent which might already be emerging, discussed below in relation to model 2, is the increasing incorporation of adversarial features such as plea bargaining into inquisitorial systems across the world, and the ideational marriage between adversarial procedural reform and liberal democratic reform. This trend may help to build the case that defendant autonomy is not merely a method by which the legitimating goals of criminal procedure can be achieved, but that promoting the exercise of autonomy-rationality is itself a core aspect of legitimacy. Despite this trend, it seems that a deep gulf remains between autonomy-rationality, and a disaggregated vision of defendant autonomy free of mental capacity requirements. Quinn and Rekas-Rosalbo take the hopeful view that scientific discovery is starting to undermining the hegemony of autonomy-rationality in favour of "sociability, connectedness, empathy [and] informal means of communication",[267] and that such "hard" science will have the necessary persuasive quality to begin shifting the

[267] Quinn & Rekas-Rosalbo, *supra* note 231 at 325.

dial in favour of universal legal capacity.[268] Such a claim will ultimately only be able to be assessed at the epochal level.

As for the consequences of model 1, a new philosophy of legitimacy would radically alter the "problem definition" defining the paradigm of adversarial criminal procedure. Were we to begin with a blank slate and a new problem definition, the primary goal of achieving supported autonomy might give rise to a criminal procedure with entirely unanticipated features which do not necessarily reflect our understanding of ideal "adversarial" systems. Of course, we do not actually have a blank slate – rather we have a historically contingent system of criminal procedure situated within criminal courts and other state institutions, informed by a variety of ideologies and populated by a range of more or less powerful or entrenched actors. These features are likely to play a significant role in the contours of adversarial criminal procedure, post-paradigm shift. But because the nature of the shift required to implement model 2 is so abstract and systemic, further speculation as to the conditions for achieving such a fundamental change, and the characteristics of any resulting procedural system, lies well beyond the scope of this thesis.

Model 2

Model 2-type change, between adversarial and inquisitorial systems, has occurred in a number of jurisdictions where a fundamentally inquisitorial procedural disposition has given way to transplanted adversarialism in recent years.[269] Accordingly it is not inconceivable that this trend might be reversed to account for the new idea of universal

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[268] *Ibid* at 317–8.

[269] Hodgson points to Italy and Chile by way of example: Hodgson, *supra* note 163; Torres notes Colombia and Guatemala's similar transformations: Torres, *supra* note 167.

legal capacity. Below I begin to explore some of the factors which might act to limit the potential for change.

The "procedural language" of adversarialism

The first and most obvious problem is the entrenched nature of adversarial criminal procedure. Such procedure can be said to be institutionalised in two broad ways: it is practiced by being ossified into codes defining the roles of various occupational groups and other actors, situated within broader state structures of investigation, punishment and risk management; but it is also ideologically entrenched, in that it acts as a "structure of interpretation and meaning" or "procedural language"[270] by which actors understand their roles and the role of the criminal justice system.

These facets of institutional entrenchment are mutually constitutive of the "sticky" adversarial paradigm. As we explored in chapter 3, the evolution and codification of adversarial procedure has been explained as a historically contingent process, a reflection of the structure of justice in early modern England which preserved the power and privileges of the gentry, and as a reflection of socialised or ideological dispositions as to the function of justice as well as the broad acceptance of rationalist ideas.

Codification is relatively simple to overcome in a criminal procedure reform project, given that a government can simply impose new procedure in a "top-down" manner. But one problem likely to pose a real challenge to inquisitorial reform is widespread acculturation of actors within an adversarial "procedural language". A "top-down" law reform project will not necessarily change the procedural language that criminal justice

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[270] Langer, *supra* note 155 at 10.

actors have been socialised into, no matter how persuasive the reasons for a new procedural paradigm may be. An example of this played out in Italy, formerly an inquisitorial jurisdiction now described as "mixed system underpinned by adversarial values",[271] through the introduction of adversarial features such as party control of evidence, removing reliance on the dossier and introducing live witness evidence as the norm. Adversarial reforms had to be enacted three times by Italian parliament, being struck down or limited twice by the Constitutional Court before being fortified through constitutional reform.[272] Marafioti suggests that an adversarial culture and tradition cannot simply be "manufactured 'out of the blue'", and that resistance to reform followed the inability of Italian judges to abandon their traditionally active role at trial.[273] A further example can be seen in superficially adversarial post-Soviet criminal procedure in the Russian Federation, which has nonetheless retained its long-standing "no acquittals" policy with conviction rates continuing to run at over 99%.[274]

Model 2 would install inquisitorial procedure in jurisdictions with an adversarial procedural language. We can speculate as to the likely cultural barriers to successful adoption of model 2: criminal judges acculturated to an adversarial "referee" role reluctant to enter the fray, and criminal defence lawyers unwilling to accept the relatively

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[271] Hodgson, *supra* note 163 at 24.

[272] *Ibid* at 24–8.

[273] Luca Marafioti, "Italian Criminal Procedure: A System Caught Between Two Traditions" in John D Jackson, Maximo Langer & Peter Tillers, eds, *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska* (London: Bloomsbury, 2008) at 93–4.

[274] Stephen C Thaman, "Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy" in John D Jackson, Maximo Langer & Peter Tillers, eds, *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska* (London: Bloomsbury, 2008).

passive role of "dossier interpreter" rather than "zealous advocate". This might also rear its head as a "cultural capital" concern as to loss of lawyers' prestige.

In keeping with the discursive institutionalist framework applied throughout this thesis, I suggest that acculturation to adversarial procedural language might best be overcome by a persuasive discourse justifying departure from the usual adversarial mode, which convinces institutional actors of the importance of adopting new professional practices. Such an approach assumes a criminal justice system is populated with creative and thoughtful actors, with the agency to deploy new ideas with normative and cognitive appeal. Quasi-inquisitorial child protection proceedings within adversarial jurisdictions provide an example of just such a persuasive discourse – it is *normatively* appealing to focus on a child's best interests rather than simply rewarding the party with the "better" claim in adversarial proceedings between parents or between parent and state; it is *cognitively* appealing to pursue a child's best interests by wresting ultimate control of the evidence from the parties in favour of an independent judicial decision-maker.

A further structural reform – judicial specialisation for all criminal proceedings – may also help to lower the barriers to acceptance of change caused by adversarial acculturation. Even jurisdictions traditionally thought of as "inquisitorial" take an adversarial approach to private disputes, leaving it to the parties to define the issues and gather the relevant evidence, even if witness questioning in courtrooms tends to be led from the bench.[275] But serious criminality tends to be tried by generalist judges in many

[275] Adrian A S Zuckerman, "No Justice Without Lawyers — The Myth of an Inquisitorial Solution" (2014) 33:4 CJQ 355 at 361.

common law jurisdictions,[276] and so without judicial specialisation model 2 procedure may often sit alongside an influential adversarial *civil* procedure.

Countervailing trends in criminal procedure reform

Seen in the broader international context of criminal procedure reform, model 2 could be said to be swimming upstream. I highlight two related countervailing ideological trends: the association of adversarialism with progress towards liberal democracy; and the procedural "convergence" prompted by competing international legal instruments.

Deeply ingrained associations between procedural models and political systems can be detected among many criminal reform advocates,[277] whereby "inquisitorialism has been seen as the tool of dictatorship, and adversarialism the natural procedural model for a modern democracy."[278] Inquisitorial justice systems emerged simultaneously across many pre-democratic societies, which leads Vogler to suggest their "first and most essential" characteristic is authoritarianism.[279] Vogler associates inquisitorial justice with rational deduction and forensic inquiry and warns that while reliance on these methods in criminal justice systems is necessary and appealing, "excessive reliance" is dangerous. By contrast adversarial criminal procedure puts far greater emphasis on defendants' procedural rights which serve to interrupt the exercise of state power.[280] The collapse of many totalitarian regimes, and a largely unquestioned American hegemony in law, has

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[276] By way of example, the High Court of New Zealand, the Supreme Court of New South Wales, and the Ontario Superior Court of Justice all have original criminal and civil jurisdiction.

[277] Langer, *supra* note 155 at 19.

[278] Hodgson, *supra* note 163 at 34.

[279] Richard Vogler, *A World View of Criminal Justice* (London: Routledge, 2005) at 19.

[280] *Ibid* at 20–1.

seen the widespread adoption of adversarial reforms in Latin America and former Soviet states.[281]

Further, international human rights norms guaranteeing fair trial rights have thought to have driven procedural "convergence" even among long-standing European democracies.[282] Article 6 of the European Convention on Human Rights affirms the right to a fair and public hearing by an independent and impartial tribunal, but also introduces accusatorial elements as a requirement of fairness, in particular the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".[283] This right has, for example, been captured by the introduction of *le principe du contradictoire* to French criminal procedure.[284]

One particular trend of relevance to adversarial tests of fitness to stand trial has been the widespread adoption of consensual simplified trial procedures or "plea" agreements in inquisitorial jurisdictions.[285] Placing the defendant in a subject position, where consequential reasoned decision-making becomes necessary, means that "unfitness" tests are now found throughout the "civil law" world. For example, Italy now has an "unfitness" procedure which has been criticised by the Committee in the sort of language

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[281] See Hodgson's discussion of Chile: Hodgson, *supra* note 163 at 28–35; see also Vogler, *supra* note 279 cs 8–9; and Torres' example of USAID funding for criminal procedure reform in Latin America: Torres, *supra* note 167.

[282] Bert Swart, "The European Convention as an Invigorator of Domestic Law in the Netherlands" (1999) 26:1 Journal of Law and Society 38–53; Brants & Ringnalda, *supra* note 155.

[283] European Convention on Human Rights, art 6(3)(d).

[284] Hodgson, *supra* note 163 at 11; Field & West, *supra* note 170 at 285.

[285] Langer, *supra* note 155.

normally reserved for adversarial jurisdictions.[286] Pre-trial evidential duties have also grown in France, where Field and West note the growing role of defence counsel from a formerly passive participant in the initial investigation whose role was largely limited to persuading the trial judge to adopt a more beneficent reading of the dossier, to an active participant in the investigative process who is occasionally also involved in calling witnesses at trial.[287]

Mere disagreement as to the preferable method for fairly seeking the truth may also provide an incomplete picture of the ideological terrain. Hodgson suggests that "politically powerful considerations of efficiency, security, and prevention" are major drivers of criminal procedural convergence in Europe.[288] Managerialism has, she says, seeped into all aspects of public administration such that efficiency has become an end in itself, and is so widely accepted within criminal justice systems that it can be regarded as "depoliticised".[289] Truncated procedures, including inducements to enter an early "plea" across both adversarial and inquisitorial systems, reflect this drive towards maximising efficiency by rapidly disposing of most cases.

Whatever the cause of adversarial reforms in inquisitorial jurisdictions, it is clear enough that model 2 does not reflect current trans-systemic trends. The growth of "mixed" systems requiring consequential reasoned decision-making as a component of fair

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[286] *Concluding observations on the initial report of Italy*, by Committee on the Rights of Persons with Disabilities, CRPD/C/ITA/CO/1 (United Nations, 2016) at paras 35–6. See also art 16 of the Netherlands code of criminal procedure which requires a criminal trial to be suspended if a defendant cannot understand the procedure.

[287] Field & West, *supra* note 170.

[288] Hodgson, *supra* note 163 at xvi.

[289] *Ibid* at 73–4.

treatment, and the associated spread of capacity testing, runs contrary to the model 2 approach.

The adversarial paradigm flexibly absorbs critique

While the previous section may suggest that inquisitorial systems are shifting towards adversarialism, a better interpretation may be that both adversarial and inquisitorial procedural paradigms can be flexibly reformatted to absorb critiques and install compromise positions. Adversarial criminal procedure has proven to be a remarkably malleable and long-lived paradigm which has eschewed ideological purity in favour of adopting features which offset the worst impacts of its core assumptions as to how fairness in truth-seeking is best assured. These include, for example, the cross-examination reform outlined in chapter 2. Another modern innovation in adversarial systems is the "problem-solving court", a more collaborative and less combative environment in which a defendant voluntarily enrols and a judge is conceived of merely as the leader of a "team" of courtroom professionals who work together to address the causes of low-level offending such as drug use or mental health problems, without resorting to imprisonment or other forms of punishment.[290] These initiatives suggest that counsel and judges can adapt to modified roles within otherwise adversarial systems.

While the procedural language of each system differs,[291] the degree of borrowing and translation occurring between adversarial and inquisitorial systems suggests that there is an absence of ideological "incommensurability". As noted already, both systems rely on fairness in truth-seeking as the core basis for their legitimacy. This suggests that a

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[290] Cindy Brooks Dollar et al, "Examining changes in procedural justice and their influence on problem-solving court outcomes" (2018) 36:1 Behavioral Sciences & the Law 32–45.

[291] See Langer, *supra* note 155.

"critical juncture" may not be needed to drive quite significant change,[292] and that the two systems will simply continue to evolve and borrow from the other as new challenges arise.

This absorptive quality gives coherence and strength to the adversarial criminal procedure paradigm, but (as I note in section 4.1 above) has proven insufficient to fully address the challenge of universal legal capacity. Accordingly, a critical juncture still appears to be necessary if model 2-type change is to be entertained – but the otherwise high degree of flexibility demonstrated by adversarialism indicates that there are slim prospects of such a juncture arising naturally.

"Levelling down" defendant subjecthood lacks appeal to Convention advocates

A further barrier to adoption of model 2 is its likely lack of appeal to Convention advocates because of its inconsistency with other values represented in Convention discourse. Model 2 depends on "levelling down" – that is, achieving universal accessibility by reducing instances of autonomous decision-making by criminal defendants in such a way that incompetence cannot threaten the fairness or integrity of the proceedings. But unless "levelling down" is just as appealing as "levelling up", equality claims are not usually pursued in this way. As Denise Réaume notes, people do not tend to seek equality for its own sake, but because the right or interest they cannot yet access "serves some human interest that they share with those others and by virtue of

[292] Carstensen, *supra* note 109 at 301.

which they think they should share in the benefit". This means that equality claims are typically reliant not on equality itself, but on another value of importance.[293]

As I have already explained, universal legal capacity is pursued on the basis that permitting people with cognitive disabilities to make consequential reasoned decisions with legal effect affirms their personhood. Far from the goal of treating disabled people as subjects rather than objects, "levelling down" all criminal defendants – *reducing* their autonomy in criminal proceedings – does not appeal to a core underlying justification for universal legal capacity.

Model 3

Model 3 shares many of the barriers I have described above in relation to both model 1 and model 2. Being a form of "civil inquisitorialism" akin to child protection or mental health treatment proceedings, model 3 suggests a significant reduction in defendant autonomy, the prospect of open-ended and repeated judicial supervision, and the imposition of potentially indefinite coercive measures for as long as is necessary to achieve "prevention". Far from reflecting a social model of disability, and realising the dream of Convention advocated to end detention on the basis of disability under art 14, a therapeutic criminal justice system would seem to inevitably reassert the legitimacy of hospitalisation and the primacy of medical discourses in the prospective management of risk. For these reasons, model 3 is unlikely to be sought by Convention advocates.

Model 2 does not seek to disaggregate autonomy-rationality; rather it removes autonomy from criminal procedure, without necessarily reformulating the substantive criminal law.

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[293] Denise Réaume, "Dignity, Equality, and Comparison" in Deborah Hellman & Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013) at 8–9.

But model 3 would reduce procedural autonomy in a similar way, while also excising the concept of "responsibility" from criminal liability which, as we have seen, itself relies on autonomy-rationality – a conception of an autonomous individual with the capacity to respond to reasons bearing on their circumstances. Such a move is likely to provoke significant resistance from those who see punishment as the purpose of criminal law (whether emphasising its deterrent, retributive or other effects). As Slobogin notes, "[t]he most fundamental argument against a prevention regime is simply that it goes against everything we stand for."[294] The theoretical justification of punishment lies well beyond the scope of this thesis, but it is sufficient to note that a provocative argument, likely to appeal to Convention advocates,[295] can be made in favour of a "right to punishment" derived from the "fundamental human right to be treated as a person" of moral status able to choose and refrain from action. Herbert Morris contrasts an imagined criminal procedure grounded in a "therapy" rather than "punishment" paradigm, under which events or dispositions are seen as symptoms of diseased thinking and treated in a blameless manner. In conceiving of punishment as a "right" in this way, Morris relies on the "capacity to reason and choose on the basis of reasons" which sets humans apart from other phenomena. The human capacity for reason is a central pillar supporting Morris's proposed right, the absence of which would (he says) result in a profoundly different conception of criminal law.[296]

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[294] Slobogin, *supra* note 260 at 130.

[295] See Quinn & Rekas-Rosalbo, *supra* note 231 at 325 where the authors similarly suggest a "right to do wrong".

[296] Herbert Morris, "Persons and punishment" (1968) 52:4 The Monist 475–501 at 494.

4.4 Opportunities for third-order change

Having identified barriers to all three models of third-order change, I finally briefly identify strategies which may hold some promise for prompting the paradigm shift sought by advocates of universal legal capacity.

Despite suggestions that "the war of ideas is over",[297] state parties to the Convention can still point to divergent international legal obligations which contradict with the new paradigm Convention advocates seek to advance. Article 14 provides the best available examples in the criminal law domain: despite the suggestion that the existence of a disability shall "in no case justify a deprivation of liberty", other authoritative instruments expressly provide for the detention of persons of unsound mind,[298] or the transfer of detainees found not criminally responsible from prisons to hospitals.[299] The lack of unanimity about the "paradigm shift", even within significant norm-setting international instruments, tends to suggest that more work needs to be done to make the new paradigm inescapable within international law.

Cognitive appeal must be cultivated in both coordinative and communicative discourse about universal accessibility to the criminal justice system. I suggest this would be assisted by development of a working model. As will be clear from the preceding discussion of universally accessible models of criminal procedure, universal accessibility to legal processes may nonetheless fail to meet the substantive expectations of advocates

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[297] Gerard Quinn, "Resisting The 'Temptation Of Elegance': Can The Convention On The Rights Of Persons With Disabilities Socialise States To Right Behaviour?" in Oddný Mjöll Arnardóttir & Gerard Quinn, eds, *The UN Convention on the Rights of Persons with Disabilities* (Leiden: Martinus Nijhoff, 2009) 215 at 216.

[298] European Convention on Human Rights, art 5(1)(e).

[299] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 109.

of a Convention-compliant criminal justice system. In particular, proposals which would "level-down" defendant subjecthood, and those reliant on potentially open-ended therapeutic and preventive measures rather than bounded punishments, are unlikely to find broad support among Convention advocates. A model of Convention-compliant procedure which actually addresses Convention advocates' wishes must therefore form part of a larger project of systemic reform.

A persuasive model of a universally accessible criminal justice system will be one which marries the existing normative appeal of disability rights claims with the cognitive appeal of real-world effectiveness. Universal legal capacity is one fundamental value that such a model must embody – now Convention advocates must both choose other animating values and orientations (therapeutic or penal; adversarial or inquisitorial?) and engage in the difficult work of "puzzling" through to a coherent working model. One instructive model from history is the *Alternative draft of a penal code for the Federal Republic of Germany*, developed by a group of West German liberal academics in 1960s in reaction to a penal code proposed by the government,[300] which succeeded in casting a long shadow of influence over the development of German penal law.[301] So long as Convention advocates remain entangled in arguments about the legitimacy of the Committee's expansive interpretations of arts 12 and 14, they divert energy from the development of a workable alternative. Proposing a workable model might help to put the idea of universal legal capacity on firmer footing, and force policy actors into debate in order to justify their (no doubt less radical) reform proposals.

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[300] Jürgen Baumann, *Alternative draft of a penal code for the Federal Republic of Germany*, translated by Joseph J. Darby (South Hackensack, NJ: F B Rothman, 1977).

[301] Manfred Maiwald, "Penal Law Reform in the Federal Republic of Germany after the Second World War" (1989) 65 Bol Fac Direito U Coimbra 121–144.

Times of "ideational collapse" in criminal justice systems, which suggest a critical juncture may be possible, are most identifiable when states seek to resolve ineffective or outdated measures, and growing patchworks of contradictions, through penal code reform projects. Root-and-branch legislative reform projects are often undertaken by a quasi-independent government agency staffed by technical experts such as lawyers and judges, often referred to as law reform or law revision commissions in common law jurisdictions. Such bodies serve to legitimise new ideas by puzzling through their specific implications, and often publish draft legislation alongside their reports.[302] Assuming Convention advocates continue to politicise the issue of disability rights in criminal procedure by pressing for the normative acceptance of universal legal capacity, the existence of an alternative model of criminal justice, at times of reform, will greatly improve the prospects of building consensus around a new set of ideas with universal legal capacity at the core, and thus facilitating a critical juncture.

[302] See for example the draft legislation published alongside the Law Commission report referred to earlier in this chapter: *Unfitness to plead, Volume 2: Draft legislation*, by Law Commission, LAW COM No 364 (London: HM Stationary Office, 2016).

Conclusion

Assuming the legitimacy and endurance of the new idea of universal legal capacity, and the need for reform of adversarial criminal procedure to realise this idea, I have endeavoured to examine the strengths and weaknesses of various models of change. While universal legal capacity has some normative appeal, none of the three models I have assessed have sufficient cognitive appeal which would make them preferable to the status quo without more development.

The difficulties inherent in implementing the idea of universal legal capacity give rise to a challenging question for disability politics in relation to art 12: "where to from here?" Ending guardianship regimes has been the core goal of art 12 advocacy. Personal decision-making about fundamentally private issues – health and personal wellbeing – is a relatively simple domain in which a paradigm shift can be imagined, because it is easier to delimit the "negative" impacts of decisions which only affect an individual, and "dying with your rights on…is now more properly regarded as a reflection of one's essential human dignity".[303] But the same reasoning does not extend to domains where there is a "reliance interest"[304] placed on a person by others, premised on autonomy-rationality – whether as a party to a contract, or as a capable "adversary" in criminal procedure. Modelling a universally accessible criminal justice system, as I suggested in chapter 4, will likely help to further debate as to the requirements of the Convention and how they might be integrated domestically – but any resulting reform seems more likely to settle on a compromise position than a paradigm shift.

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[303] Peay, *supra* note 43 at 28.

[304] Quinn, *supra* note 150.

Disability rights advocacy is grounded in the social model of disability – a cross-cutting identity-based politics of compromise, absorbing both physical and cognitive impairment. This approach has met with success in certain domains, but the challenges of universal legal capacity illustrates its limits – "fitness to stand trial" only really engages certain types of disability in certain circumstances. Critical disability scholars, who have influenced art 12 discourse, seek to move beyond the limits of critiquing formal structures within a disabled/able binary which characterises the "liberal humanist" approach to ameliorating oppression through universal human rights, towards a more fundamental re-evaluation of what it means to be human.[305] This tension makes the melding of the human rights discourse of art 12, with a cultural critique of deeply entrenched assumptions about autonomy-rationality and personhood, something of an odd marriage which (unlike much other "equality" discourse) gives rise to great difficulty in identifying concrete proposals for reform.

Further, there is a risk that focusing on rights of "access" to legal processes does not serve to address the well-documented material disadvantages and additional costs facing disabled people. Strong constructivist critiques such as Arstein-Kerslake's "illusion of cognition" claim explored above need to engage with the reality of the risk of unconscionable harms – harms like interpersonal domination by the more cognitively able party to a contract, or exercising the freedom to make disastrous decisions about criminal trial strategy and winding up avoidably imprisoned. In the same way that meritocratic thinking which ignores the reality of human variation implicitly endorses

[305] Shildrick, *supra* note 51.

domination by those with a great deal of intellectual ability,[306] universalist thinking about legal capacity risks endorsing domination *of* those with greatly *limited* intellectual ability.

Concerns as to "personhood" which underlie universal legal capacity discourse might be better addressed by philosophies which do not rely on disaggregating autonomy-rationality or entanglement with juridical personhood to assert moral worth and species membership – "a way to articulate social-ethical status that does not derive" from the autonomy assumption of the social contract, "and that takes account of the full nature of human interdependency, vulnerability, and finitude."[307] For example, under Nussbaum's "capabilities" approach, capabilities are a basic framework for realising the human potential to flourish, emerging from the human "species norm", which ought to drive a "social goal" of helping each person meet a minimum threshold for each capability.[308] But people for whom this social goal will fail – who lack and will always lack "in any meaningful sense" the capacity to effectively take advantage of a capability assuming a human capacity for rationality, such as political participation – ought not to be considered any less "human" than anyone else.[309]

Simplican, studying the way that cognitively disabled people actually engage in disability politics, suggests radical methods of "alliance, humor and dance" as three tools of political citizenship not premised on cognitive competence.[310] Although these actions

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[306] Fredrik deBoer, *The Cult of Smart: How Our Broken Education System Perpetuates Social Injustice* (New York: St. Martin's Publishing Group, 2020).

[307] Berger, *supra* note 236 at 177; see also Kittay, *supra* note 242.

[308] Nussbaum, *supra* note 161 at 71.

[309] *Ibid* at 186–9.

[310] Stacy Clifford Simplican, *The Capacity Contract: Intellectual Disability and the Question of Citizenship* (University of Minnesota Press, 2015) at 24.

may be critiqued as not in themselves being political strategies which challenge power,[311] they are doubtless expressions of a life well-lived – and, much like Nussbaum's capabilities approach, imply a basic claim to the conditions necessary to enjoy such a good life.

Achieving all of this, I suggest, will require a political strategy with a much greater material focus, grounded in a bountiful conception of the good life and an expansive, non-legalistic approach to personhood.

[311] James Berger, "Rethink: Agency, theory and politics in disability studies" in *Manifestos for the Future of Critical Disability Studies* (Routledge, 2018).

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